United States Court of Appeals

for the

District of Columbia Circuit

TRANSCRIPT OF RECORD

391

IN THE UNITED STATES COURT OF APPEALS
FOR THE DISTRICT OF COLUMBIA CIRCUIT

WALTER A. WEISS v. KAY JEWELRY STORES, INC., et al., CECIL D. KAUFMANN and SIMON HIRSHMAN, Appellants.	No. 24443
WALTER A. WEISS v. KAY JEWELRY STORES, INC., JOEL S. KAUFMANN, Appellant. CECIL D. KAUFMANN, et al.	No. 24444

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 14 1970

Nathan J. Paulson
CLERK

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CONSOLIDATED APPEALS FROM
A JUDGMENT OF THE
UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

JOINT APPENDIX

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HUGH B. COX
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October 30, 1968	Answer of deft. #1 to complaint; c/m 10/30/68. Appearance of David G. Stevenson.	6
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Date	Entry	Docket No.
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UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER A. WEISS, 200 East 83rd St., New York City, N. Y., Plaintiff v. KAY JEWELRY STORES, INC., (serve registered agent: Simon Hirshman, at offices of Kay Jewelry Stores, 1328 New York Ave. N. W., Washington, D. C.), JOEL S. KAUFMANN, Kay Jewelry Stores, 1328 New York Ave. N. W., Washington, D. C., CECIL D. KAUFMANN, Kay Jewelry Stores, 1328 New York Ave. N. W., Washington, D. C., DONALD J. KAUFMANN, Kay Jewelry Stores, 1328 New York Ave. N. W., Washington, D. C., SIMON HIRSHMAN, Kay Jewelry Stores, 1328 New York Ave. N. W., Washington, D. C., BENJAMIN B. GOLDING, Kay Jewelry Stores, 1328 New York Ave. N. W., Washington, D. C., MARK A. FREEDMAN, Kay Jewelry Stores, 1328 New York Ave. N. W., Washington, D. C., MELVIN R. RUDOLPH, Kay Jewelry Stores, 1328 New York Ave. N. W., Washington, D. C., Defendants	:	Civil Action No. 2218-68

COMPLAINT - STOCKHOLDER'S DERIVATIVE ACTION

Plaintiff, Walter A. Weiss, complaining of defendants, Kay Jewelry Stores, Inc., Joel S. Kaufmann, Cecil D. Kaufmann, Donald J. Kaufmann, Simon Hirshman, Benjamin B. Golding, Mark A. Freedman, and Melvin R. Rudolph, alleges:

1. The Court has jurisdiction of this action under D. C. Code §11-521. The damages claimed, exclusive of interest and costs, exceed $10,000. Defendant Kay Jewelry Stores, Inc. (hereinafter called the Company), is a corporation which has its principal office, and does business, in the District of Columbia. The individual defendants reside or may be found in the District of Columbia.

2. Plaintiff brings this action on behalf of himself and all other shareholders of the Company similarly situated.

3. Plaintiff is now, and was at the time of the transactions herein complained of, a shareholder of the Company, holding 104 shares of the Company's capital stock.

4. Plaintiff fairly and adequately represents the interests of the shareholders of the Company similarly situated in enforcing the right of the Company herein alleged.

5. The individual defendants are, and were at all times relevant to this action, directors of the Company and a majority of the Company's board of directors. In addition, the individual directors respectively hold, and held at all relevant times, the following offices in the Company: defendant Joel S. Kaufmann, Treasurer; defendant Cecil D. Kaufmann, President; defendant Donald J. Kaufmann, Store Supervisor; defendant Simon Hirshman, General Counsel and Secretary; defendant Benjamin B. Golding, Vice-

President; defendant Mark A. Freedman, Store Supervisor; defendant Melvin R. Rudolph, Store Supervisor.

6. On or about June 7, 1966, defendant Joel S. Kaufmann purchased from the estate of Robert D. Kaufmann, deceased, at a public sale ordered by the Surrogate's Court of New York County, New York, certain shares in approximately 40 subsidiary corporations of the Company, at a price of $205,330.03. The aggregate book value of such shares was approximately $469,653.

7. Said purchase by defendant Joel S. Kaufmann was made with the prior knowledge of the other individual defendants and in accordance with an arrangement among the individual defendants that Joel S. Kaufmann would subsequently resell the shares to the Company at a price higher than the price he would pay at the public sale.

8. On or about July 1, 1966, the Board of Directors of the Company, at a meeting attended by the individual defendants, authorized the acquisition by the Company of the shares of the Company's subsidiaries purchased by Joel S. Kaufmann from the estate of Robert D. Kaufmann. Said authorization provided that the Company would pay Joel S. Kaufmann for such shares an aggregate sum not to exceed $411,000, the exact amount to be determined upon audit and to be the costs incurred by Joel S. Kaufmann in acquiring said shares.

9. The audit referred to in paragraph 8 was made by three employees of the Company, who reported to the Board of Directors that the acquisition cost of Joel S. Kaufmann for the shares to be purchased by the Company was $397,200.29.

10. The acquisition cost reported by the auditors included large amounts which were not in fact costs or expenses of the acquisition of said shares by Joel S. Kaufmann. Thus the auditors included in the acquisition cost expenses, including legal fees, incurred by Joel S. Kaufmann in

contesting the will of his brother, Robert D. Kaufmann, deceased, which contest was for the personal benefit and interest of Joel S. Kaufmann.

11. The auditors' report informed the Board of Directors, and the individual defendants knew, that the reported acquisition cost included Joel S. Kaufmann's expenses for the will contest and other amounts not properly a part of the true acquisition cost of the shares acquired by Joel S. Kaufmann from the estate of Robert D. Kaufmann, deceased.

12. Nevertheless, the Board of Directors, including the individual defendants, approved the report of the auditors and caused the Company to pay Joel S. Kaufmann $397,200.29 for the aforesaid shares.

13. The aforesaid actions of the individual defendants were a breach of their fiduciary obligations as directors and officers of the Company, and enabled defendant Joel S. Kaufmann to profit personally at the expense of the Company in violation of his fiduciary obligations as a director and treasurer of the Company.

14. On August 30, 1967, counsel for plaintiff, at plaintiff's request, wrote each of the directors of the Company, including the individual defendants, requesting that they have the Company take appropriate action to recover the excessive payment made to Joel S. Kaufmann. A true copy of the letter is attached hereto, marked Exhibit A.

15. The directors, including the individual defendants, did not respond to the letter referred to in paragraph 14 hereof, and have failed to take action to remedy the matters herein complained of

16. Plaintiff has not requested the shareholders of the Company to take action to remedy the matters herein complained of for the reasons that such a request is not required by law, would involve prohibitive expense, and would obviously be futile since the individual defendants

with their spouses own a controlling number of the voting shares of the Company.

17. This action is not a collusive one to confer on a court of the United States jurisdiction which it would not otherwise have.

WHEREFORE, plaintiff demands (1) that judgment be entered in favor of the Company and against the individual defendants in the amount of $192,000, plus interest, costs and expenses; (2) that plaintiff be awarded compensation for the expenses of this litigation and the investigation preliminary thereto; (3) that plaintiff's attorneys be awarded reasonable counsel's fees; and (4) such other and further relief as may be just and proper.

Joseph Forer

Joseph Forer
Forer & Rein
711 14th St. N. W.
Washington, D. C. 20005
NAtional 8-4047
Attorneys for Plaintiff

STATE OF NEW YORK,
COUNTY OF ~~NEW YORK~~ SUFFOLK, SS:

WALTER A. WEISS, being first duly sworn, deposes and says that he is the plaintiff in the above action; that he has read the foregoing complaint; and that the matters alleged therein are true to the best of his information, knowledge and belief.

Walter A. Weiss

Walter A. Weiss

Subscribed and sworn to before me, a notary public in and for the State of New York this 6 day of September, 1968.

Thomas R. Heffernan

Notary Public

THOMAS R. HEFFERNAN
NOTARY PUBLIC, State of New York
No. 52-1736[illegible]
Qualified in Suffolk County
Term Expires March 30, 1969

[Caption Omitted in Printing]

FILED
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ANSWER OF INDIVIDUAL DEFENDANT JOEL S. KAUFMANN TO COMPLAINT

1. Defendant admits the allegations contained in paragraph 1 of the complaint, except that he denies that the individual defendants other than Cecil D. Kaufmann, Simon Hirshman, and himself reside or may be found in the District of Columbia.

2. Defendant avers that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 2 of the complaint.

3. Defendant avers that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 3 of the complaint.

4. Defendant denies the allegations contained in paragraph 4 of the complaint.

5. Defendant admits that the individual defendants are now and since 1964 have been directors of the Company, a majority of the Company's Board of Directors, and the holders of the offices identified in paragraph 5 of the complaint, but defendant denies the remaining allegations contained in paragraph 5 of the complaint.

6. Defendant avers that on June 7, 1966, he purchased from the estate of Robert D. Kaufmann, deceased, at a public sale ordered by the Surrogate's Court of New York County, New York, certain securities of 39 subsidiary corporations of the Company and of three corporations affiliated with the Company at a price of $205,330.03, and that the aggregate book value of said securities on February 28, 1966 was $490,420.67. Except

as admitted herein, defendant denies the allegations contained in paragraph 6 of the complaint.

7. For answer to paragraph 7 of the complaint, defendant avers that, at a meeting of the Board of Directors of the Company held on January 25, 1966, the following Resolution was unanimously adopted:

> "Whereupon, on motion duly made, seconded, and passed, it was resolved that the President, C. D. Kaufmann, be and he is hereby authorized to negotiate for the purchase of such minority interests as he deems desirable and advisable on such terms and conditions as, in his opinion, might be advantageous to this company."

At this meeting there was discussion regarding the securities of the Company's subsidiaries and affiliates owned by the estate of Robert D. Kaufmann. Such discussions contemplated that defendant would purchase such securities at the public sale and that the securities so acquired would be purchased by the Company at a price measured by defendant's purchase price at the public sale and some fair share of the expenses that he had incurred in the litigation that resulted in the sale of such securities Subsequently, there were similar conversations between C. D. Kaufmann and defendant. Except as admitted herein, defendant denies the allegations contained in paragraph 7 of the complaint.

8. Defendant admits the allegations contained in paragraph 8 of the complaint, except that he denies that he attended that portion of the meeting of the Board of Directors of the Company at which the purchase of the securities was considered and avers that he, C. D. Kaufmann, and Donald J. Kaufmann abstained from voting on the motion which authorized the Company to purchase the securities.

9. For answer to paragraph 9 of the complaint, defendant avers that the audit referred to in paragraph 8 of the complaint was made by three persons, two of whom were employees of the Company and one of whom, James R. Stoner, was special counsel to the Company, and that the audit reported

that defendant's cost of acquiring the securities that were to be purchased by the Company was $400,729.09, subject to minor adjustments which subsequently reduced the cost to $397,200.29.

10. Defendant admits that the acquisition cost reported by the auditors included expenses, including legal fees, incurred by defendant in contesting the will of his brother, Robert D. Kaufmann, deceased. Except as admitted herein, defendant denies the allegations contained in paragraph 10 of the complaint.

11. Defendant denies the allegations contained in paragraph 11 of the complaint, except that he admits that the auditors' report informed the Board of Directors, and the individual defendants knew, that the reported acquisition cost comprised the items specified in that report and that such items included a portion of defendant's expenses in contesting the will of Robert D. Kaufmann.

12. For answer to paragraph 12 of the complaint, defendant avers that, at a meeting of the Board of Directors of the Company held on September 28, 1966, the auditors' report was presented to the members of the Board, including the individual defendants. The Board of Directors, by passing a motion upon which defendant, C. D. Kaufmann, and Donald J. Kaufmann abstained from voting, ratified and reconfirmed the action taken at the meeting referred to in paragraph 8 of this answer, causing the Company to pay defendant $397,200.29 for the securities purchased by the Company from defendant.

13. Defendant denies the allegations contained in paragraph 13 of the complaint.

14. Defendant admits the allegations contained in paragraph 14 of the complaint.

15. For answer to paragraph 15 of the complaint, defendant avers

that the proxy statement attached to the Notice of Annual Meeting of Stockholders, dated September 27, 1967 advised the Company's shareholders that, in response to the letter referred to in paragraph 14 of the complaint, the Company has taken the position that defendant's expenses of acquisition were a proper cost for the acquisition of the shares.

16. For answer to paragraph 16 of the complaint, defendant admits that plaintiff has not requested the shareholders of the Company to take action to remedy the matters herein complained of. Defendant avers that, as of August 1, 1968, the individual defendants and their spouses own, of record and beneficially, approximately 45 per cent of the voting shares of the Company. Except as admitted herein, defendant denies the allegations contained in paragraph 16 of the complaint.

17. Defendant avers that he is without knowledge or information sufficient to form a belief as to the truth of the allegations contained in paragraph 17 of the complaint.

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Attorneys for defendant Joel S. Kaufmann

[Certificate of Service Omitted in Printing]

[Caption Omitted in Printing]

ANSWER OF INDIVIDUAL DEFENDANTS
CECIL D. KAUFMANN AND SIMON HIRSHMAN

Defendants Cecil D. Kaufmann and Simon Hirshman answer the complaint in this action as follows:

1. They admit that plaintiff seeks to bring this action under D.C. Code § 11-521, that the damages claimed, exclusive of interest and costs, exceed $10,000, and that defendant Kay Jewelry Stores, Inc. (hereinafter called the Company), is a corporation which has its principal office, and does business, in the District of Columbia. They deny that the individual defendants other than they themselves and Joel S. Kaufmann reside or may be found in the District of Columbia.

2. Answering paragraph two of the complaint, they admit that plaintiff seeks to bring this action on behalf of himself and all other stockholders of the Company similarly situated.

3. They aver that they are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph three of the complaint.

4. They deny the averment of paragraph four of the complaint.

5. They admit that the individual defendants are, and have since 1964 been, directors of the Company, a majority of the Company's Board of Directors, and the holders of the Company positions specified by paragraph

five of the complaint. Except as admitted herein they deny the averments of paragraph five of the complaint.

6. They aver that on June 7, 1966, defendant Joel S. Kaufmann purchased from the estate of Robert D. Kaufmann, deceased, at a public sale ordered by the Surrogate's Court of New York County, New York, certain securities in thirty-nine subsidiary corporations of the Company and in three related corporations at a price of $205,330.03, and that the aggregate book value of said securities on February 28, 1966, was $490,420.67. Except as admitted herein they deny the averments of paragraph six of the complaint.

7. Answering paragraph seven of the complaint, they aver that at a meeting of the Board of Directors of the Company held on January 25, 1966, the following resolution was unanimously adopted:

> "Whereupon, on motion duly made, seconded, and passed, it was resolved that the President, C. D. Kaufmann, be and he is hereby authorized to negotiate for the purchase of such minority interests as he deems desirable and advisable on such terms and conditions as, in his opinion, might be advantageous to this company."

At that meeting there was discussion regarding the securities in the subsidiary and related corporations of the Company held in the estate of Robert D. Kaufmann. These discussions contemplated that Joel S. Kaufmann would bid in such securities at the auction and that the securities so acquired would be purchased by the Company at a price measured by what Joel S. Kaufmann paid for the securities at the auction and a fair share of the expenses which he had

incurred in the litigation that resulted in the auction of such securities. Subsequently there were similar conversations between Cecil D. Kaufmann and Joel S. Kaufmann. Except as admitted herein they deny the averments of paragraph seven.

8. They admit the averments of paragraph eight of the complaint, except that they aver that defendant Joel S. Kaufmann did not attend that portion of the July 1, 1966, meeting at which the purchase of said securities was considered, and that neither he nor defendants Cecil D. Kaufmann or Donald J. Kaufmann voted at said meeting on the question of purchasing the securities.

9. They aver that the audit referred to in paragraph eight of the complaint was made by three persons, of whom two were employees of the Company and one was its special counsel; that the auditors reported to the Board of Directors that the acquisition cost of defendant Joel S. Kaufmann for the securities to be purchased by the Company was $400,729.09, subject to minor adjustments, and that minor adjustments subsequently reduced the cost to $397,200.29.

10. They admit that in reporting the acquisition cost the auditors included expenses, including legal fees, incurred by defendant Joel S. Kaufmann in contesting the will of his brother, Robert D. Kaufmann, deceased. Except as admitted herein they deny the averments of paragraph ten of the complaint.

11. They deny the averments of paragraph eleven of the complaint, except that they aver that the auditors' report dated September 28, 1966 informed the Board of Directors, and the individual defendants knew, that the reported acquisition cost consisted of the items specified in that report which included certain expenses of defendant Joel S. Kaufmann incurred in said will contest.

12. They admit the averments of paragraph twelve except that they aver that neither Donald J. Kaufmann, Joel S. Kaufmann, or Cecil D. Kaufmann voted upon said action.

13. They deny the averments of paragraph thirteen.

14. They admit the averments of paragraph fourteen.

15. Answering paragraph fifteen of the complaint they aver that in the Company's Proxy Statement, dated September 15, 1967, p. 4, the Company's shareholders were informed that, in response to the representations of plaintiff's counsel, the Company has taken the position that Joel S. Kaufmann's expenses of acquisition were a proper cost in the acquisition of the securities.

16. Answering paragraph sixteen of the complaint, they admit that plaintiff has not requested the shareholders of the Company to take action to remedy the matters herein complained of. They deny that such a request is not required by law, that it would involve prohibitive expense, and

that it would obviously be futile. They aver that as of August 1, 1968, the individual defendants and their spouses owned approximately forty-five percent of the voting shares of the Company.

17. They aver that they are without knowledge or information sufficient to form a belief as to the truth of the averments of paragraph seventeen of the complaint.

s/ Hugh B. Cox
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s/ Michael Boudin
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Attorneys for Individual
Defendants Cecil D.
Kaufmann and Simon Hirshman

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT

FOR THE DISTRICT OF COLUMBIA

- x

WALTER A. WEISS, :

Plaintiff, :

v. : Civil Action

KAY JEWELRY STORES, INC., et al., : No. 2248-68

Defendants :

- x

Washington, D.C.

FRIDAY, February 7, 1969

Depositions of CECIL D. KAUFMAN and JOEL S. KAUFMAN, witnesses of lawful age, taken on behalf of the plaintiff in the above-entitled action, pending in the United States District Court for the District of Columbia, pursuant to notice, before Jeanette Karp, a notary public in and for the District of Columbia in the offices of Shea and Gardner, 734 15th Street, N.W., Washington, D. C., at 11:10 a.m., Friday, February 7, 1969.

- - -

APPEARANCES:

On behalf of the plaintiff:

David Rein, Esq.
Joseph Forer, Esq.
711 14th Street, N.W.
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On behalf of defendant Kay Jewelry Stores, Inc.:

David C. Stevenson, Esq.
Colorado Building
14th & G Streets, N.W.
Washington, D.C.

On behalf of defendants Cecil D. Kaufman and Simon Hirshman:

Hugh B. Cox, Esq.
Michael Boudin, Esq.
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Washington, D.C.

On behalf of defendant Joel S. Kaufman:

Francis M. Shea, Esq.
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Washington, D.C.

- - -

Thereupon,

CECIL D. KAUFMAN

a witness of lawful age, was duly sworn by the notary public and, being examined by counsel, testified as follows:

DIRECT EXAMINATION

BY MR. FORER:

Q Would you state your name, please.

A Cecil D. Kaufman.

Q Mr. Kaufman, you are one of the defendants in this

3 case; is that correct?

A Yes.

Q And is it not correct, also, that you are president of Kay Jewelry Stores, Inc.?

A Correct.

Q You are also a member of the board of directors of Kay Jewelry Stores, Inc.; is that correct?

A Yes.

Q How long have you been president of Kay Jewelry Stores, Inc.?

A Kay Jewelry Stores, Inc.--since its inception approximately twelve years.

Q And you have been president continuously during that time?

A Yes.

Q And you were, during that time, continuously a member of the board of directors; is that correct?

A Yes.

Q Do you happen to know--at least approximately--how many voting shares of Kay Jewelry Stores, Incorporated are now outstanding?

A One million three, plus an odd figure--I don't know precisely at this moment.

Q Do you know--at least approximately--the total number of holders of record of that outstanding voting stock

4 at this writing?

A No.

Q Not even approximately?

A At this writing, no--I could guess it would be eleven or twelve hundred; strictly a guess.

Q Could you tell us about how many voting shares, shares of the corporation, were outstanding on August 30, 1967?

A Approximately the figure I gave you minus a dividend of five percent in shares.

Q What about on September, 1968?--the number of voting shares outstanding.

A That would be in the same neighborhood.

Q Same neighborhood as at present?

A No--between that and five percent.

Q The five percent stock dividend came after September, 1968?

A I am not sure of the date. I think you are right; I am not sure.

Q Do you know approximately the total number of holders of record of the outstanding voting stock on August 30, 1967?

A No, I don't.

Q Same question as to September, 1968.

A No, I wouldn't venture that; I don't know.

5 Q What is your relationship to the co-defendant Joel S. Kaufman?

A First cousin.

Q Mr. Joel Kaufman has a position with the corporation; is that correct?

A Correct.

Q What is that position?

A He is treasurer and a member of the board.

Q Board of directors?

A Yes.

Q Did he have those same positions throughout 1966 and 1967?

A Yes.

Q Were you also a cousin of the late Robert D. Kaufman who died on April 18, 1959?

A Yes--that was Joel's brother.

Q I would like to invite your attention to Paragraph of the Answer that was filed on your behalf.

MR. COX: We can give him a copy of that to save you from dismantling your file. This is it.

MR. FORER: Yes--Paragraph 7.

THE WITNESS: Yes.

BY MR. FORER:

Q In Paragraph 7 you will notice a reference to the meeting of the board of directors of the company -- and

6 throughout when I say the company you will understand that I mean Kay Jewelry Stores, Incorporated -- a meeting of the board of directors of the company held on January 25, 1966.

Have you brought with you the minutes of that meeting?

A I know they were just --

MR. COX: We have --

MR. FORER: May we see it, please.

MR. COX: I may as well --

MR. FORER: Let's have it marked.

MR. COX: -- give you a --

MR. FORER: A copy of --

MR. COX: Minutes of three meetings which you asked for.

MR. FORER: Okay, good.

MR. COX: I will state for the record that I am giving to Mr. Forer minutes of a meeting of the board of directors of Kay Jewelry Stores, Inc. held on January 25, 1966; the minutes of a special meeting of the board of directors of Kay Jewelry Stores, Inc. held on July 1, 1966; and the minutes of the annual meeting of the board of directors of Kay Jewelry Stores, Inc. held on September 28, 1966.

Did I, in describing the first of these documents, say it was the minutes of a special meeting of the board of directors?

7 (Whereupon, the reporter read the following:)

"MR. COX: I will state for the record that I am giving to Mr. Forer minutes of a meeting of the board of directors of Kay Jewelry Stores, Inc. held on January 25, 1966;"

MR. COX: It should be the minutes of a special meeting.

The documents that I am giving to you were not the complete minutes of these meetings because the minutes contained entries relating to a number of transactions in each case that in the judgment of counsel had no bearing on the transaction that is the subject matter of this law suit; so we have excerpted the minutes, preserving in them everything that is necessary to show who was present, who acted, and everything in the minutes that relates to the transaction with Joel Kaufman which is the subject matter of this litigation.

MR. FORER: Do you happen to have extra copies of that you could spare to us?

MR. COX: We have some. Do you want the witness to have a set, or do you want an extra copy?

Do you want two copies?

MR. FORER: We are going to have these marked.

MR. COX: I will give you an extra copy. We may, in the course of the deposition, want to look at it again.

8 MR. FORER: Would you please mark as Plaintiff Depositions Exhibit number 1 for identification this copy of the minutes of the special meeting of January 25, 1966.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 1 for identification.)

MR. FORER: And this will be -- the minutes of a special meeting of July 1, sixty-six will be Exhibit 2 for identification, and the minutes of September 28, 1966 will be Exhibit 3 for identification.

(The documents referred to above were marked Plaintiff Depositions Exhibits No. 2 and No. 3 for identification.)

BY MR. FORER:

Q Mr. Kaufman, is Plaintiff's Exhibit number 1 for identification a true and correct copy of the official minutes of a special meeting of the board of directors held on January 25, 1966?

I should say a true and official copy of excerpts from the official minutes for the meeting of that date.

A I would say so.

Q Is the same thing true with regard to Plaintiff's Exhibit 2, as being an excerpt from the official minutes of a special meeting of the company's board of directors held on

9 July 1, 1966?

A I would say so. It is signed by the Secretary.

Q Is Plaintiff's deposition exhibit 3 for identification a true and correct copy of excerpts from the official minutes of the meeting of the board of directors of the corporation for the meeting held on September 28, 1966?

A I would say so. The Secretary signed it.

Q Would you take a look.

A Is this what you are referring to?

Q At your Answer; a copy of your Answer.

A Yes.

Q Would you take a look at Paragraph 7.

A Yes.

Q On Page 3, at the top of Page 3, you will see that it states that at that meeting--referring to the minutes of the board of directors, referring to the meeting of January 25, 1966 which is recorded in Plaintiff's Exhibit 1 for identification -- it says at that meeting there was a discussion regarding the securities in the subsidiary and related corporations of the company held in the Estate of Robert D. Kaufman. And then there is a reference to the nature of the discussion subsequently.

Will you kindly take a look at Plaintiff's Exhibit number 1 for identification and point out to me what in those minutes reports on, or reflects the discussion

referred to in Paragraph 7 of your Answer.

A I would say the remaining paragraphs on Page 2.

Q That's the paragraph on Page 2?

A No--I said the last two paragraphs as they are enumerated on Page 2.

Q I have the wrong one.

The last two paragraphs on Page 2.

A Yes.

Q Looking at --

They are the only paragraphs on Page 2.

A That is correct. I said there are only two paragraphs.

Q Looking at the first of those two paragraphs --

A Right.

Q -- it states that you reported there you had a number of inquiries from minority stockholders in subsidiary corporations.

Who was a minority stockholder who inquired about securities held in the Estate of Robert D. Kaufman?

A Who was the what?

Q In Paragraph 7 you say there was a discussion regarding the securities held by the Estate of Robert D. Kaufman.

A That is correct.

Q You say that; this first paragraph on Page 2 of

11 the minutes referring to that; is this correct?

A It does not refer to that as such. It refers to minority stockholders' inquiries, of which this could be considered one.

Q Who made an inquiry regarding the securities held by the Estate of Robert D. Kaufman?

A That would have to do with Joel Kaufman.

Q You mean Joel Kaufman had made one of the inquiries?

A One of the inquiries.

Q Referred to in that Paragraph.

A That is correct.

Q Were there other persons who had made such inquiries besides Joel Kaufman?

A I think that second paragraph answers your question because it says there that I was authorized to negotiate for the purpose of such minority interest as deems desirable and advisable in terms of conditions and et cetera.

Q I am really referring not to authorization but to the inquiries you have told us --

A There was more than one if that is the question.

Q I am trying to find out who they were.

A To give you an enumeration of who they were I couldn't from recollection, frankly.

Q How many were they?

12 A I would say two or three others.

Q Besides Joel?

A Yes, sir.

Q Did the inquiries of these two or three others have anything to do with the stock held by the Estate of Robert D. Kaufman?

A No--they were other individuals.

Q This inquiry by Joel Kaufman--that only related to stock held by the Estate; is that correct?

A Correct.

Q When you reported on these inquiries to the board of directors, did you inform the board of directors that one of these inquiries was an inquiry by Joel Kaufman with respect to the securities held by the Estate of Robert Kaufman?

A The answer would be yes.

Q You did tell them who the inquiries were from in other words.

A That is correct.

Q Do you know why the minutes omit any statement as to who the minority stockholders were?

A Frankly I don't think they were enumerated.

Q You mean their names weren't mentioned.

A No.

Q You just told me the name of Joel Kaufman was

12 mentioned.

A I am talking about the balance--the Joel Kaufman situation was discussed, yes.

Q In other words you reported to the board of directors --

One--that Joel Kaufman had made an inquiry about the possibility of a sale of securities in the Estate of Robert Kaufman, and --

Two--that certain other stockholders, other than Joel Kaufman, had inquired as to the possibility of selling their interests in subsidiary corporations of the company.

Is that correct?

A Yes.

Q But you didn't name those others.

A No.

Q Did you say how many of those others there were?

A In recollection I can only say there were two or three others.

I might also add that this was not anything particularly new; that over the course of the years whenever I contemplated something or I thought there was a possibility of doing something on behalf of the company I would get permission as a matter of form from the board to negotiate.

Q I understand that.

A After I got that permission, if I was able to make

14 the negotiation, I was dutybound, as I always did, to go back to the board to get full approval to act.

Q Do you know why there is no reference in the minutes of the board of directors to your having reported that you had an inquiry from Joel Kaufman regarding securities held in the Estate of Robert Kaufman?

A I am sorry; I didn't get your full question. Do I know why --

Q Do you know why these minutes do not report that you told the board of directors that Joel Kaufman had inquired about the possibility of a sale of securities in the Estate of Robert Kaufman?

A The answer is I would not know. Frankly I don't write the minutes; the Secretary does.

Q You gave no instruction to the Secretary with regard to the preparation of these minutes; did you?

A No, no.

Q Who was the Secretary?

A Simon Hirshman.

MR. COX: Off the record.

(Discussion off the record.)

BY MR. FORER:

Q I assume from your testimony that you had conversations with Mr. Joel Kaufman prior to this meeting of January 25, 1966 regarding the securities held by the Estate

of Robert Kaufman; is that correct?

A Correct.

Q When was the first of these conversations that you had with Mr. Joel Kaufman on that subject?

A Would you refresh my mind as to the date you just quoted.

Q This meeting --

A I don't mean that. You just made a statement about prior to a certain date.

Q January 25, 1966 was the meeting that you first -- Am I correct?--this was the first time you reported to the board of directors about the possibility of the company purchasing the stock held by the Estate of Robert Kaufman; is that correct?

A That is correct.

Q And you reported to the board of directors--as you have already told us--that Joel Kaufman had made an inquiry or discussed the matter with you prior to this meeting of January 25, 1966.

A That is correct.

Q When was the first time that Joel Kaufman talked to you about this subject?

A That would be hard to answer. I would say that it was over a period of a year maybe because of this lawsuit in the Circuit Court that he had; it went on for a long time

16 and he is my cousin and we are very close and it would be obvious that he would discuss a lot of these things with me.

Q I don't mean discussions with the litigation particularly. I am talking about discussions with regard to the possibility or advisability of the company acquiring stock owned by the Robert Kaufman Estate.

Have I made myself clear as to the subject matter?

A Yes.

Q Were there a number of discussions on that subject?

A Yes.

Q And about when was the first of these discussions?

A This I can't answer truthfully with accuracy. I can say that when Joel Kaufman found out that they were going to auction or put up an upset price or whatever the attorneys call it; whatever those dates were was the time of my first discussion with Joel.

Q Suppose I told you that the records of the administration of the Estate of Robert D. Kaufman show that the temporary administrator filed a petition which was dated May 13, 1965 for authorization to sell at public auction various securities in the Estate of Robert D. Kaufman, including the securities in the subsidiaries of Kay Jewelry Stores -- remember that was May 13, 1965.

The order approving that petition was issued by the Surrogate Court on April 29, 1966; and that order set the

17 public sale or auction for June 7, 1966, although I think it was actually delayed, the sale itself.

Giving you those dates--May 13, 1965 as the date of the petition to sell the securities; April 29, 1966 as the order authorizing the sale; and June 7 or 8, 1966 as the date of the actual sale -- Does that help you establish, at least roughly, when you had the first conversation with Joel Kaufman about the possibility of the company purchasing securities from the Estate of Robert Kaufman?

A I believe that I answered in part, to the previous question when I said that Joel and I were close and he did discuss things with me and I also said that I believe that was six months to a year before.

Q Before the meeting of the board of directors?

A No, before the actual --

Q Sale.

A -- sale; because naturally he was looking for advice and opinion.

Q Well, a year before the sale would be June of 1965.

A Uh hmm.

Q Would you say that he discussed this with you before--first discussed this with you before or after June of 1965?

A I would have to have too meticulous of a memory to pin it down to a date. I am sorry; I can't do it; I don't

know.

Q Thereafter, did you have other discussions on this same subject with Joel Kaufman prior to the board of directors meeting of January 25, 1966?

A Yes.

Q About how many of those discussions did you have?

A I guess I would pick a number from four to ten. I don't know; they were spontaneity.

Q Let me ask you this.

I am going to ask you what was said in these discussions.

A That's all right.

Q Are you able to answer this in terms of each discussion at a time?

A No, I don't think so.

Q Why don't you tell me what was said in these prior to the meeting of January 25, 1966?

A You are being fair enough. I can't pin down precisely. The essence of the discussions was that Joel in his personal discussions said that he would never allow the stocks -- I am not talking about Kay as such -- the stocks that were in the Estate to get in anybody's hands.

As I recollect, there were three or four different segments involved; I don't know precisely. I know that one was Kaufman Furniture; another was the Kaufman Company; the

19 Swope Company; Kay stock; et cetera.

And it was of importance to him to get these various and sundry groups back into his own immediate family ownership and then he had asked me once if it was possible that he bought all of the stuff at a subsequent auction, whether it would be possible to take the Kay minorities and swap it in for Kay Jewelry, Inc. stock which is a public stock.

And I said truthfully I don't know how that could be done because there have been previous requests made and the lawyers said it would be too complex in underwriting and all the rest of it.

During some period of time he said did I think that the board or the company would buy the Kay stock, the Kay shares, if he was able to buy the same thing.

Q Excuse me--by Kay shares; with the subsidiary corporation?

A That is right; in the Estate--because they were not Kay Jewelry, Inc. shares; they were shares of 39 or 40 subsidiary corporations.

Q Go ahead.

A I said, if you do, I don't see any reason why the company wouldnt want them because if they fell in other hands there could be a source of considerable difficulty in this number of corporations.

29 And he said--I can't sell it, formally sell it, to anybody unless I get what I consider cost.

And the essence of what was considered cost -- not only the piece of paper the share was written on but various and sundry things that make lawyers rich, fees, what-have-you

Q Make some lawyers rich.

The cost of a piece of paper was not alone; in other words, there was cost of getting to Court, fees, et cetera.

A Whatever they were-- he said I consider part of the cost of shares in which I agreed.

Q He was telling you this before the shares had been sold at this public auction.

A I believe that is correct; he had not gotten them.

Q He was telling you this after the public auction had been initiated either by the petition or possibly after the petition had been authorized; is that correct?

A This I would not know.

Q I believe you already told us when he first spoke to you he told you that the upset price was being fixed for sale of this stock by the Estate.

A That was during one of the conversations.

Q These conversations really took place when he already expected that there would be a sale with an upset price; is that correct?

21 A I don't think it was as definitive as that--no.

Q At least some of the conversations --

A Were quite definitive.

Q The conversation in which he had the discussion with you what was the true cost.

A That was definitive.

Q And that occurred after he already knew that there was going to be a sale.

A This I can't answer; I don't know whether he knew or not. I didn't know--let us put it that way.

Q Do you know when this conversation on true cost took place, approximately?

A As a guess I would say the true cost was only known after he had gotten the shares or the bid.

Q You told us of a conversation held before January 28, 1966 --

A Correct.

Q -- which was a meeting of the board of directors -- in which he said to you he would be interested in transferring this stock to the corporation but that, of course, he wanted his --

A Selling.

Q In selling it to the corporation but of course he would want his true cost.

A That is correct.

22 Q How long before the meeting of January 25, 1966 did that conference occur?--or give a range if possible.

A I would only guess without telling a falsehood I would say some time before.

Q Would you say six months before?

A I wouldn't say anything. I said some time before; I don't know the date.

Q As I understand it,this conference, he was talking to you; he was saying to you that he wouldn't sell his stock to someone outside the family.

A No--he never said it in such words; you say that.

Q He expressed to you the feeling that it would be undesirable for this stock to be transferred.

A In strange hands--let's put it that way.

Q And I believe you said that he said he wouldn't transfer the stock to strange hands.

A He didn't say -- he said he would go the limit to make sure it didn't.

Q That is what he said.

A (Shakes head affirmatively.)

Q Was it your understanding at the time of this conference that he owned this stock?

A Not at that time.

Q You knew, in fact, that the stock was owned by the Estate --

23 A Oh yes.

Q -- of Robert Kaufman.

A Correct.

Q And you also knew at the time of this conversation that the stock was going to be sold at public auction.

A That is correct.

Q Go on with the rest of the conversations in so far as you haven't already covered them, that you had with Joel Kaufman prior to this meeting of January 25, 1966.

A Somewhere along that period of time that we are discussing, I did say to Joel that I felt that it would be to the company's interest and the stockholders protection if the company owned the Kay shares. We had no interest in his other shares at all.

Q And by Kay shares you meant the shares in the subsidiary companies.

A Thirty-nine or forty--whatever the number -- for a lot of reasons, and I did say to him then rather explicitly I felt that the board would go along on purchasing these shares from him at the cost to him for those shares, providing it did not exceed the bookvalue at that date, whatever the date was of purchase; this I did state.

Q You did consider that it would be in the interest of the corporation --

A Definitely.

Q -- of the company to acquire these shares.

A Definitely.

Q Was there anything more that you can recollect in these conversations with Joel Kaufman prior to the board of directors' meeting of January 25, 1966?

A Well, I think that the main essence of the fact has been covered.

Q Prior to this, prior to the meeting of January 25, 1966, is it fair to say that you had informed Joel Kaufman that you would recommend to the board of directors that it was to the interest of the corporation to buy this Kay stock from the Kaufman Estate, and to you; that you would recommend that they buy it from Joel Kaufman when, as and if he acquired it paying him for it what he considered the true costs, including the cost of Estate litigation.

A Not what he considered the true cost. You see after the --

Q Paying for it what the corporation would consider the true cost.

A That is correct. There is a little difference.

Q But you would regard that as part of this true cost would be the cost he had in connection with the litigation in the Kaufman Estate.

A Allocably.

Q Allocable?

A That is correct.

25 Q Did you report all this to the board of directors on January 25, 1966?

A I reported my opinion.

Q Did you --

A And either at that meeting, or the subsequent meeting--I am not sure which--I did not want to get involved; I wanted the facts as to -- I mean I didn't want to get involved as to what was the true price and I appointed a committee consisting of Donald Hudson --

Q Let me interrupt -- You mean to evaluate?

A That is correct.

Q Let me stop you; we will get to that.

But you did report at the June 25, 1966 meeting --

MR. COX: January.

MR. FORER: Excuse me--January 25, 1966 meeting that the price that would be paid Joel Kaufman for the shares would include his litigation cost; that is the cost or an allocable share --

THE WITNESS: That is right.

MR. FORER: -- of the costs in this litigation on the Estate; is that correct?

THE WITNESS: That is correct.

BY MR. FORER:

Q At the time, did you report to the board of directors at least approximately the amount of these costs,

26 litigation costs?

A I did not know them.

Q Did you have any idea of their magnitude?

A No, sir.

Q Did you know the nature of this litigation that Joel --

A Oh yes.

Q Actually you have already told us that Joel and you were very close and he constantly kept you informed on this matter; is that correct?

A When I said constantly I don't mean day to day; if there was some happenstance that he wanted to discuss he did it with me or Simon Hirshman.

Q Did you tell the board of directors about the nature of this litigation?

A If you mean did I talk about the characters involved?--because I could have talked long about them.

Q Did you tell them, for example, it was essentially or included at least litigation brought by Joel Kaufman and Aaron Kaufman to contest a will of the late Robert Kaufman?

A I don't remember doing that; I don't remember anybody had informed anybody; everybody was cognizant of it.

Q You didn't explain the nature of the litigation at this meeting of the board of directors on January 25, 1966.

27 A It was a personal matter with Joel. I don't think it was anybody else's business.

Q Did any of the board of directors ask you anything about the nature of this litigation of which they voted to assume an allocable share of the costs?

A The nature of the litigation?

Q Did they ask any questions about the nature of the litigation?

A I don't think so because they all knew it, most of them; this has been going on for years.

Q In these conversations you had with Joel Kaufman, did he ever suggest to you that the company could or should bid in these shares at this auction?

A On its own?

Q On its own.

A Yes--this was discussed.

Q Do you remember when that was discussed?

A No.

Q But it was one of those conversations prior to the meeting of January 25, 1966.

A Yes.

Q Tell us what that discussion was.

A Well, I think it was during one of the conversations where he wanted to know if he could swap the minority holdings for the public company holdings of Kay Jewelry, Inc.

28 and I was asked if I thought it was a good business judgment to have Kay bid on it. There were several things involved there.

Q This was what you told him?

A Yes--this is part of my discussion.

But first of all you must understand that I was not involved at all and I was representing Kay Jewelry, Inc. and I couldn't or wouldn't do anything even in favor of Joel if I thought it was to the detriment of the company.

So my business discretion or judgment told me that it would be completely wrong either directly or indirectly to have Kay bid against Joel for several reasons. First --

Q Is this what you told him in this conversation?

A Yes.

First--because I felt that the minute we reached for it and somebody else would say it's a great value--Joel was not acting on our behalf; he was acting on behalf of the plaintiff but the minute the company as such entered into it I felt that somebody else might come in and bid on it; the price goes out the window which I think ultimately was attempted.

The point being that you had this thing, sort of thing happen before. The further we stayed away from it, the better off I thought the company was.

29 Q This is all what you told Joel? Or is this what you are telling me?

A No--I told Joel; I discussed with Simon --

Q Go ahead.

A -- furthermore while it wasn't quite clear--I must confess--whether the Court was going to put it up piecemeal or whether the Court or the Judge or whoever does that was going to say it is one ball of wax and I want to bid on everything.

If they did the latter, this certainly was of no service to Kay because Kay then would have been the minority holder in the other corporations in which we had no interest.

I must tell you one other thing at this juncture; that we had up to last year a contract with Prudential Life, a five million dollar loan; a breach made it payable on demand instead of in sixteen years, in which one of the codicils states quite specifically that we may not buy any corporation or any company unless we buy one hundred percent of the shares.

From where I sat it was poor judgment to fool around because we would then if we bought -- we have Swope stock, Kaufman Furniture, Kaufman stock and whatever else was in the package; so this was a second reason.

Q This is also what you told Joel?

30 A That is correct.

Q Go ahead with the further discussion please.

A I think I have given you the outline.

Q Did you ever ascertain prior to this January 25, 1966 meeting what the upset price was?

A Yes I heard that.

Q Did you ever ascertain in what blocks these securities were to be sold?

A Not in final, no. I don't know; I wasn't there; I had no part of it.

Q Did Joel ever tell you?

A I don't recall him doing so.

Q Did you ever ask Joel?

A No.

Q Did you ever have an attorney or anyone else check into the division of the securities to be sold at this public auction; that is the different corporations, in what kind of lots they were to be sold?

A As to the lots, no. The last I heard was that it was one ball of wax; as to what Kay shares were in there?--Yes, I know our only interest was Kay.

Q The last you heard before the meeting of January 25 1966 was that the sale would be all securities in one ball of wax.

A I didn't hear this. This was a possibility.

31 Q You said the last you heard.

A The last I knew.

Q From whom did you know that?

A Joel.

Q Joel told you that the sale would be of all the securities held by the Estate in one lot?

A Well, I don't know; I can't swear which way he told me but it was -- I heard somewhere and it may have been from Joel or it may have been from Simon--whether it was finally sold that way I don't know.

Q I am not talking about the way it was finally sold. I am talking about what your understanding was prior to this meeting.

A What my understanding was is hearsay. I wasn't there and I had no reports on the surrogate at all.

Q As I understand, one of the reasons why you told Joel that you recommended that the company not bid on it at the auction was that you didn't want the company to be faced with a situation where they were buying stock in corporations other than Kay Jewelry--other than Kay subsidiaries.

A I did say that because we had the contract which forbade it.

Q But you made no effort to find out whether the terms of the sale were such that you would be faced with that situation.

32 A I don't think it made any difference to me or the company.

Q You mean it wouldn't have made any difference as to your decision if, in fact, the shares in the Kay subsidiaries would be offered separately from shares in other corporations.

A That is correct because I would not have sent a representative either directly or indirectly to bid against Joel because Joel had told me he wouldn't allow anybody to buy it.

Q The real reason why you felt that you should buy from Joel rather than by bidding at an auction was that you didn't want to bid against Joel?

A The real reason is that I didn't want the company to pay more money than I thought they would have to pay under other circumstances.

Q And that would be because you would have to be bidding against Joel.

A Or others.

Q Or others.

Did Joel tell you that if the company went into the bid for these shares he would bid against the company?

A In so many words, no. I told you before that Joel said he wouldn't let anybody ~~bid on~~ buy the shares under any circumstances.

33 Q Because he didn't want them to get in the hands of strangers.

A That is right.

Q But obviously he didn't consider the company to be a stranger because he arranged with you to resell it to the company.

A He had not arranged to sell it to the company through me at all.

He asked me if the company would buy it and I said I felt that the board would approve, providing the total cost did not exceed the book --

Q What made you believe that if the company went in to buy this stock that Joel would bid against the company? That is, if the company went in to buy it on its own.

A I don't believe Joel would bid against the company but it would be obvious that the company was bidding.

The proof of the pudding was there was a man there that I have known forty years and he wanted to get the sale delayed because he wanted to put a bid in; which proved it--had I had a man in -- I knew who that man represented. He was an accountant.

If I had one of those men or you, they would have penetrated who sent them, particularly if Joel didn't bid.

Q At that time Joel was treasurer of Kay Jewelry; is that correct?

34 A That is correct.

Q So let's see now as to the reasons why you felt that Kay Jewelry should not bid in this stock, on its own; the first reason--the possibility that the stock might be offered in one lump which included shares of other corporations that you never checked into whether or not that was true or wasn't true.

A If it was true we were forbid by the contract.

Q Because you didn't bother to check whether it was true or not true.

A I don't know the price that they sold it or how they sold it.

Q You even told me if the stock were sold in separate batches so the Kay shares were separate you still wouldn't have recommended that the company purchase because you didn't want to bid against Joel.

A I didn't say that. I said I didn't want to open it up so it became obvious that other people might enter the bid.

Q You felt pretty sure if the company did bid Joel would not bid against the company.

A That is in-correct. *

Q You felt that if the company appeared on the date of the sale or a representative of the company appeared on the date of the sale and bid at public auction that would send

35 the price up.

A I don't know. This is a supposition. This was business judgment--right or wrong.

Q In making this business judgment, did you take into account when Joel Kaufman would appear on the date of sale and bid in the stock that someone might assume that he was representing the company?

A There was a possibility of that I presume but I think there was less possibility on that because Joel had been fighting this thing over a period of quite a few years on behalf of his own sons; nobody else was involved.

The man was aware that I had had a lot of personal experience; that I personally didn't want to get these minority -- if he was any different he wouldn't be doing what he is now.

Q Did you ever suggest to Mr. Joel Kaufman that it might be a good idea for him to appear at the public auction and bid in the sale for the company?

A No.

Q Bid the purchase for the company?

A No--he did not represent the company in that bid at all.

Q And you never suggested that as a possibility?

A I never did.

Q You preferred to rebuy it for him at his cost of

36 acquisition.

A As long as it did not exceed the book value.

Q At that year.

A That is right.

Q It never occurred to you to send any individual as a straw to buy these shares on behalf of the company.

A You have asked me that before and I told you why I didn't.

Q I asked you before whether it occurred to you to ask Joel Kaufman to bid it in for the company.

Now, I asked whether it ever occurred to you to ask anybody or send somebody in, a straw name.

A My recollection --

Q Answer yes or no.

A Well I can't answer it yes or no.

Q Answer it your own way then.

A Thank you.

I told you before that I felt the minute we had anybody representing our company, straw or anyone else, that somebody would get wise to it and the price of the shares would go up.

I figured if Joel did it on his own he was doing it for his own family because there were a lot of other things involved to the benefit of his family: that this would be a normal procedure.

37 Q How could you figure that somebody --

A Being a male I use feminine intuition I presume because it's happened to me before.

Q Did it ever occur that someone might get wise to the arrangement made prior to the auction by the corporation with Joel Kaufman whereby they would repurchase the shares from Joel Kaufman at a price consisting of what he paid for the stock plus his cost of acquisition?

MR. COX: I am driven reluctantly to object to the question on the ground that I think it reflects a misunderstanding of the present record.

MR. FORER: Would you mind telling me what is a misunderstanding.

MR. COX: I have not heard the witness testify there was any arrangement of that kind but I may be misunderstanding that; they had some conversation.

MR. FORER: The answer refers to the fact that the -- I believe the answer refers to the fact that prior to the public sale -- Let me put it this way.

Isn't it correct that prior to the auction sale, that is the public sale of June 7, 1966, it had already been understood between the company and Joel Kaufman that the company would repurchase the stock from Joel Kaufman at this true cost basis?

THE WITNESS: That's not a correct statement. We

38 had not been already understood at all.

The statements that were made between us were to the effect that I would recommend to the board, who would have the final approval, yea or nay that they buy the shares from Joel at his cost if they so vote and I would recommend it just so long as the price did not exceed the book value of that year.

I could not make such an agreement as you stated.

BY MR. FORER:

Q As a matter of fact you reported to the directors on January 25, 1966 that--I believe you have already told us--that it was your recommendation that the company should purchase this stock for Joel Kaufman after he purchased it at this auction sale provided that they would pay Joel Kaufman the true cost of acquisition which would include the allocable share of the litigation cost and provided the total price did not exceed the book value.

I believe your testimony is already to that effect; is it not?

A Not in those words. I will agree in essence.

Q That is a fair summary?

A Yes.

Q And then at this January 25, 1966 meeting--after having made this recommendation to you--the board of directors passed a resolution authorizing you to negotiate for

39 the purchase of this stock on such terms as you deemed advisable; correct?

A No, it doesn't say that at all. It allows me to negotiate -- I will quote it verbatim.

Q Whatever it is it will stand. I will withdraw the question.

A All right.

Q Let me put it this way -- never mind.

Prior to this January 25, 1966 meeting, had you held discussions with anybody other than Joel about the possibility of purchasing the Kay stock from the Estate of Robert Kaufman or by purchasing it from Joel after he purchased it from the Estate?

A I can recollect walking into Simon Hirshman's office one morning and Joel and he were discussing this whole thing in which I was particularly concerned about. He was a lawyer; I am not, and there was a discussion then.

Q I don't want to ask you any questions which would invade the attorney-client privilege.

Was this a discussion with Mr. Hirshman in his capacity as your counsel?

A No--it was a discussion between Joel and an attorney.

Q What was the substance?

A You just said you wouldn't inquire about that.

Q I thought you said -- I beg your pardon.

40 A If I said it's attorney and counsel and client you wouldn't inquire about it and that is what it was about.

Q Mr. Hirshman -- Was Mr. Hirshman being your attorney in this matter?

A No--he was being Joel's attorney.

Q Was he being the attorney for the corporation in this matter?

A Not at that time.

Q In this conversation?

A No--it was a personal invasion on my part truthfully.

Q They didn't kick you out.

A They aren't big enough.

Q They didn't ask you politely.

A Don't ask me what they said; you can ask me what I said.

Q I don't think I am invading the attorney-client privilege of Mr. Joel Kaufman when I ask you to tell what you heard, what was said in your hearing by them.

A I didn't hear them saying anything other than the fact they were talking about the Surrogate Court.

Q Do you remember the date?

A No, I don't. It was in the period you inquired about.

Q How long before this January 25, 1966 meeting?

A It was during one of the discussions that I quoted

39 the purchase of this stock on such terms as you deemed advisable; correct?

A No, it doesn't say that at all. It allows me to negotiate -- I will quote it verbatim.

Q Whatever it is it will stand. I will withdraw the question.

A All right.

Q Let me put it this way -- never mind.

Prior to this January 25, 1966 meeting, had you held discussions with anybody other than Joel about the possibility of purchasing the Kay stock from the Estate of Robert Kaufman or by purchasing it from Joel after he purchased it from the Estate?

A I can recollect walking into Simon Hirshman's office one morning and Joel and he were discussing this whole thing in which I was particularly concerned about. He was a lawyer; I am not, and there was a discussion then.

Q I don't want to ask you any questions which would invade the attorney-client privilege.

Was this a discussion with Mr. Hirshman in his capacity as your counsel?

A No--it was a discussion between Joel and an attorney.

Q What was the substance?

A You just said you wouldn't inquire about that.

Q I thought you said -- I beg your pardon.

42 Kaufman?"

THE WITNESS: He did not.

BY MR. FORER:

Q Now, in this meeting of January 25, 1966, this resolution that is recorded on the second page, you construed this resolution to authorize you to negotiate with Joel for the purchase of this stock, that is this Kay stock, that was at that time in the Robert Kaufman Estate; correct?

A Not entirely. I construed it to be one of three.

Q It included negotiations with Joel.

A Yes.

Q Did every director present at the meeting vote on that resolution?

A I don't recall.

Q Would you look. Do you note any notation of anyone abstaining in this particular meeting?

MR. COX: I think everything is in the minutes on who voted we have given to you.

MR. FORER: Yes--I am sure you have.

THE WITNESS: Well, apparently everybody voted on this one.

BY MR. FORER:

Q Would you take a look now at Paragraph 7 of your Answer again, and Page 3, the last sentence.

It says--Paragraph 7 -- it says--subsequently there

43 were similar conversations between Cecil D. Kaufman and Joel S. Kaufman.

Do you see that sentence?

A Yes.

Q Did you have any conversations with Joel Kaufman after the board of directors meeting of January 25, 1966?--whether on that day or any following day.

A It says so.

Q Regarding --

I know it says it in the Answer.

Regarding this purchase of securities from the Estate of Robert Kaufman.

A Other than?

Q You have told us about the discussions you had prior to the January 25 meeting.

A Right.

Q You have told us what was said at the board of directors meeting.

A Right.

Q After the board of directors meeting, but on January 25, 1966, did you have a conversation with Joel Kaufman relating to the same matter?

A I believe I did.

Q What was that conversation?

A I am not certain about this but I do believe it referred to what the costs would be. I am not definitely

44 positive about this but I don't think he had gotten all his costs together at that time, that is legal fees and what he was going to be confronted with.

Q But he gave you some idea of the amount.

A No he didn't at that time. I think it was subsequent thereto or another meeting that I appointed a committee to find this out.

Q What was that conversation about?

A Detail is very difficult to recollect except to say that the essence of it was probably that he wanted to know when the thing was going to be transpired or when it would be a fait accompli. And I said we can't do that until you get all your costs together and have it explored, and explained the company would have to do that.

I think this is the main part of the subsequent conversations.

Q Did you have other conversations with him on this same subject; that is the purchase of these shares subsequent to the meeting of January 25, 1966 and the actual auction sale in June of 1966? In other words, we are talking about the period between January and June 7 or 8, 1966.

A If there were they were relative to the same thing, yes. I do believe that there was some discussion but what was involved as parcels or pieces I am not sure and I must admit I have a cloudy recollection of whether he told me or

45 didn't tell me that it would be put up in pieces or as a whole ball of wax.

Q You say he did tell you?

A I say I am not certain whether this had something to do with the discussion because as I recollect the sale transpired some time around June of sixty-six.

Q June of 1966?

A Yes, I think so.

So there was this element of the time between the January meeting and June but I would say that -- well, there are others involved about settlement and other things.

Q Is it fair to say that it was your understanding prior to June, to this public auction of June, 1966, that Joel Kaufman would bid for the shares and that if he bought them he was going to resell them to the company?

A Under the same terms and conditions as I stipulated

Q That is right--the actual price, along the principles indicated.

A I also believe that during that period there were other conversations relative to the settlement. I don't know whether it was in that period; you will have to ask Joel because he has a better recollection of the periodic timing of these things than I. He was more deeply involved.

I think in the time period there was some matter of settlement offered by or suggested by the Court and there

46 was some question whether he should take it or shouldn't and I said I would if I were you; or to that effect, and the final element Mr. Weiss as usual backed off; so that was one discussion I believe.

Q It is also fair to say that your conversations with Joel manifested to you prior to this auction sale of June, 1966 that it was his understanding that the company would buy the securities from him if he bought them at the auction; of course on those same terms as already indicated.

A Correct.

Q Do you have any notes or records of any of these conversations?

A No.

Q Were there any letters exchanged between you and relating to this matter?

A Not at all.

Q You have no notes or memoranda of these conversations?

A No I do not. If I did I wouldn't be so vague as to dates.

Q Yes--I understand.

Let's come to this meeting of the board of directors held on July 1, 1966.

(Whereupon, a short recess was taken at the request of the reporter.)

47 BY MR. FORER:

Q Mr. Kaufman, would you take a look at Plaintiff Exhibit 2 for identification which is the minutes of the special meeting of the board of directors of July 1, 1966.

Will you look at the paragraph on the second page. It refers to a report prepared by Messrs. Stoner, Hudson and Rihtarchik.

Who arranged for the preparation of this report?

A Arranged for the preparation--I don't know who arranged for it. I appointed this committee.

Q Before this meeting of July 1, 1966--you must have.

A Yes.

Q This is not the meeting at which they presented the audit. This refers to a report prior to the audit. I don't want to mislead you.

A If you don't mind I will just read this for a second.

Now, what is the question about this?

Q At this meeting there was presented to the directors a report by--prepared by these three gentlemen; right?

A Correct.

Q Obviously the report was prepared prior to the meeting.

A Right.

Q How did this report get prepared? Did you tell these

48 gentlemen to prepare the report?

A I told these three men -- and by identity James Stoner is an attorney; and Donald Hudson is a CPA and so is Jack Rihtarchik--and their requirement was to find out exactly what was paid for these shares and to get the bills from Mr. Joel Kaufman and to allocate within their discretion the cost.

Now, Joel had made the statement he wouldn't sell it unless he got his cost out of it.

Q Take a look at the third page of those minutes.

Now the third page of those minutes authorizes an audit; correct?

A Yes, that is correct.

Q So that this report which is referred to in the second page was not the audit which was authorized.

A That was a summary, preliminary thing.

Q Who told Messrs. Stoner, Hudson and Rihtarchik to make this report.

A Well, first of all they had to be appointed a committee and then they had to be charged.

Q Who appointed them?

A I did.

Q When did you appoint them?

A I don't know; I think it was done at a previous meeting.

49 Q A previous meeting of the board of directors?

A Yes--I am not sure when.

MR. COX: Off the record.

(Discussion off the record.)

MR. FORER: Let's get back on the record.

BY MR. FORER:

Q Would you tell us what your best recollection is.

A My best recollection?

Q How this report came to be prepared.

A That I appointed this committee of the three men that I mentioned before and they were to get -- they made a report at this particular meeting.

Q And the advisability --

A Huh?

Q Go on.

A July first, 1966.

Q Now it is correct; is it not?--that there was no meeting of the board of directors of the company between September 28, 1966 and July --

A No--January.

Q Excuse me--January 25, 1966 and July 1, 1966.

A I would have to say the minute books would record it.

MR. COX: We are informed that is the case.

MR. FORER: Can we stipulate on that? Is that right, Mr. Hirshman?

50 MR. HIRSHMAN: You asked me for all the minutes -- off the record.

(Discussion off the record.)

MR. FORER: Can we stipulate?

MR. COX: I will so stipulate subject to check of the minute book.

BY MR. FORER:

Q Who was James S. Stoner?

A He is an attorney.

Q What connection, if any, does he have with Kay Jewelry?

A He is on a retainer.

Q Is he in the office of your general counsel, Mr. Hirshman?

A No--he has his own office outside our building.

Q He is an attorney who represents the corporation.

A When requested.

Q But he has a retainer.

A That is correct.

Q Who is Donald E. Hudson?

A Donald E. Hudson was a former CPA at the Touche, Ross accountant firm and I employed him some years back as our comptroller which he currently is.

Q At this time he was an employee of the company.

A Correct--he is comptroller.

51 Q Jack Rihtarchik?

A He was also formerly of Touche, Ross and was employed by me for the company as a special projects man.

Q At that time he was working for the company.

A At that time he was with Kay, yes.

Q Do you have a copy of this report that is referred to in these minutes?

A I don't have.

MR. COX: As far as we have been able to determine there was no written report.

THE WITNESS: This was an oral report to my recollection.

BY MR. FORER:

Q Could you tell us the substance of this oral report.

A I don't recall the substance. It had to do with this particular proposed purchase of Joel's minority purchase.

Q To yourrecollection did it give any information as to acquisition costs of Joel Kaufman?

A Is that not in the next meeting?

Q The next meeting they presented the audit.

This was before the audit was made.

A The audit would not have been made in -- would not have been in here. This was a preliminary --

MR. COX: Off the record.

52 (Discussion off the record.)

MR. FORER: Back on the record.

BY MR. FORER:

Q Mr. Kaufman, look at page 3 of the minutes where there is a reference to $411,000.

Where did that figure come from? What does it represent?

A I think it came as a result of queries to Joel Kaufman as to what the aggregate sum might be and it was approved that the corporation would buy these shares at a figure not to exceed four eleven.

Q Earlier it had been understood that the company would pay no more than the book value, the aggregate book value.

A That is correct.

Q What was the understanding if you had any? Or was it reported what was the book value?

A The book value in recollection was somewhere around four hundred ninety.

Q Going back now -- It is apparent; isn't it?--that Messrs. Stoner, Hudson and Rihtarchik must have reported at least an approximation of the costs. Is that correct?

A Something comes back to me. I think that they had-- Rihtarchik had gotten the bills from Joel and as I recall there was one item that was still in question, or one bill.

53 This I am not positive of because I was not actively in the committee; I never interfered with them and they brought in their findings. But I think this is why subsequently the precise figure is there.

Q Can you recall the nature of the discussion--what is referred to here on page 2 as extended discussion as to the advisability of this purchase? Can you recall the nature of this discussion? Can you summarize it?

A The discussion would be a natural one. I think it was an enlightenment for the men that probably asked questions like Dr. Cox or Professor Cox; Harry Watkins of Bankers Trust or one of the others that are not involved in the day-to-day conduct of the business, that wanted to know what they were asked to vote upon. There were quite a few questions.

Q Did any director ask why the corporation had not purchased this stock on its own at the auction?

A Not to my recollection.

Q That subject wasn't raised at all?

A I didn't; the company didn't.

Q It wasn't raised at all at the board meeting.

A Not to my recollection.

Q Was there any discussion of what would be reported to shareholders with regard to this purchase of stock from Joel Kaufman?

54 A I don't think that there would be any discussion at the board meeting of that sort. We are a public company and whatever is necessary to file we file and I think it was all disclosed. I don't know that number.

Q Do you remember any questions that members of the board of directors did ask at this meeting about this transaction?

A Well, this is a very difficult question to answer today. Someone might have asked how many companies were involved and was it advantageous or disadvantageous. They may have asked how it came about.

Q Did someone ask how this arrangement came about?

A No, I mean how a glob of 39 corporations came about.

Q Came to be available?

A That is right.

Q Nobody asked how it came about that Joel was selling it to the corporation rather than buying it from the corporation? Nobody asked how it came about that Joel was selling it to the corporation?

A I think that was a foregone conclusion of why he would sell it to the corporation because first of all they were a minority; second of all, we wanted to do it.

Q When Messrs. Stoner, Hudson and Rihtarchik gave their report it was on the basis of that report that the

55 top figure of $411,000 was set; correct?

A If that's the final figure on the report.

Q That $411,000 is on the third page.

A Okay.

Q That indicates -- and I believe you said they weren't exactly certain because at least one item was still unclear in the dispute.

A It may have before--it may have at that meeting; this I don't remember. It wasn't in dispute; it was a bill he hadn't received.

Q This report made by these three gentlemen was on the understanding that -- or on the assumption that part of the price to be paid to Joel Kaufman was his allocable share of his litigation costs in connection with the litigation in the Estate of Robert D. Kaufman.

A Correct--because he made it clearly understood he wouldn't sell unless he got his cost.

Q By the way, did you know in this litigation the two parties attempting to upset the will were Joel Kaufman and his brother, Aaron Kaufman?

A Oh yes.

Q So was it your understanding that when Joel was referring to his costs of litigation he was including Aaron's costs as well?

A Frankly I never looked at it that way. It was Joel's

56 responsibility and I discussed with Joel. He was the prime factor involved.

Q Is it fair to say that you understood it would be the costs of litigation without dividing it between Joel and Aaron?

A That is correct.

Q Is it correct that you later appointed the same three gentlemen to make the audit referred to in the resolution adopted on July first, 1966?

A This was one committed to completion, yes.

Q Did you give them any instructions on preparation of this audit?

A Yes.

Q What instructions did you give them?

A I said first of all they were to find out the precise purchase of the shares from the Court and they were to find out the precise billing that he received and they were to use their best judgment collectively as to the allocable shares that were within their judgment fair to one package against another and so forth.

Q When you say bills that he received, by he you mean Joel Kaufman?

A Joel.

Q By billing you are referring to the bills incurred by him in this Estate litigation; correct?

57 A That is correct.

Q Plus any other bills which might represent the expenses of the sale.

A I don't even know whether that was in or not truthfully.

Q At least you didn't think of any other possibility.

A I didn't think of any other possibility at all; I happen to trust him.

Q Do you have with you the copy of the audit that was eventially made by this committee?

A Do I?

Q Yes.

A No.

Q I am sure your counsel does.

MR. COX: We do.

MR. PORER: May we have this marked.

MR. COX: I will give you this document which is headed -- Report, September 28, 1966 -- addressed to the Board of Directors, Kay Jewelry Stores, Inc.

It consists of two typewritten pages, the second of which is signed by Hudson, Rihtarchik and Stoner, and there are attached to it six pages of handwritten schedules.

I am not sure that I am in a position to tell whether the last handwritten schedule attached to this was in fact attached to this document as it was delivered to the

58 board but we are giving it to you because it seems to relate to this report.

MR. FORER: Off the record.

(Discussion off the record.)

MR. FORER: On the record.

Would you mark this. This will be 4 and this is 5.

(The documents referred to above were marked Plaintiff Deposition Exhibits No. 4 and No. 5 for identification.)

MR. FORER: The parties stipulate that Plaintiff's Exhibit 4 for identification is a true copy of the written report referred to in Plaintiff's Exhibit 3 for identification and is a written report handed to the board by Mr. Hudson, Donald Hudson, and signed by Mr. Hudson, Mr. Rihtarchik and Mr. Stoner.

Is that a correct stipulation?

MR. COX: I am prepared to stipulate.

I want to be sure — Mr. Boudin? -- you are right, that all of the handwritten schedules attached to the two typewritten pages were submitted to the board. Are we clear about that?

MR. BOUDIN: I don't have any reason to doubt it but I will be willing to check it for you.

Do you know, Mr. Hirshman?

59 MR. HIRSHMAN: I would have to ask Mr. Rihtarchik and Mr. Hudson.

MR. COX: I am sorry. We have agreed; I will stipulate without any qualification that the two typewritten pages -- take a look at the typewritten pages; it does list A, B, C, D and E.

I am prepared to stipulate that those were attached to the exhibit.

MR. FORER: That is all I am talking about now. Plaintiff's Exhibit 4 does -- off the record.

(Discussion off the record.)

MR. FORER: We have stipulated that Plaintiff's Exhibit 4 is a true copy of that report.

Can we also stipulate that --

MR. COX: Yes.

MR. FORER: Can we also stipulate that Plaintiff's Exhibit 5 is a true copy of the compilation made in connection with the audit by this committee but not presented to the board of directors?

MR. COX: I am going to defer to Mr. Boudin.

MR. BOUDIN: I do not think that is accurate.

MR. FORER: Why don't you make it accurate.

MR. BOUDIN: It is difficult to go further than to say it is a paper apparently prepared later in connection or supplementing the original September report.

69 MR. FORER: Was this made by some member of the audit committee? Can you say that?

MR. BOUDIN: I can't say with certainty, no.

MR. FORER: Whatever it is, it is there.

MR. COX: I think we can in time ascertain for you who did prepare that and we will undertake to do that if we can.

MR. FORER: Off the record.

(Discussion off the record.)

MR. FORER: Back on the record.

BY MR. FORER:

Q Looking at Plaintiff's Exhibit number 4 for identification, does that show the shares of stock which the corporation purchased from Joel Kaufman?

A Since I never audited this myself I have to presume that it does.

Q Which schedule shows the stock that the corporation purchased from Joel Kaufman?

A Presumably this schedule shows the shares.

Q Which schedule? A, B, C, D, E, or what? I believe it would be more than one schedule.

A No, it would be C only--securities of 40 Kay subsidiary companies and 2 affiliated companies acquired from the Estate of Robert D. Kaufmann, Deceased, for the book value as of February 28, 1966 totaling $490,420.67.

61 Q What about E--wouldn't that be in addition to the preferred stock?

A Yes.

Q D is the same as C.

A C did you say? It is E talks about preferred stocks.

Q That --

A That would be in addition.

Q E in addition to C?

A I would say so.

MR. FORER: Off the record.

(Discussion off the record.)

MR. FORER: On the record.

BY MR. FORER:

Q Is it correct that the total price paid to Joel Kaufman for this stock is the figure appearing on the bottom of Plaintiff's Exhibit 5 for identification; namely, $397,200.29? Is that correct?

MR. COX: We will stipulate to that.

THE WITNESS: I don't know the precise figure. I know it is three ninety.

MR. FORER: Can we also stipulate that this breakdown is correct; namely, that was done on the basis that legal expenses were $191,870.26 --

THE WITNESS: I don't know whether you can because

62 on page 2 --

MR. FORER: -- and cost of stock was $205,330.03?

THE WITNESS: I don't know.

MR. COX: Off the record.

(Discussion off the record.)

MR. FORER: On the record.

Exhibit 5 for identification came from the company files--it is so stipulated.

BY MR. FORER:

Q At this meeting of September 28, 1966, which is recorded in Plaintiff's Exhibit 3 for identification; did any member of the board of directors object to this resolution authorizing it, or ratifying and confirming the purchase of stock from Joel Kaufman?

A I don't believe so.

Q Did any of them question the amount of the costs of acquisition listed in Schedule A, Exhibit 4 for identification?

A No.

Q Did you read the report which is Exhibit 4 for identification prior to the meeting?

A Prior to this meeting?

Q Yes.

A You mean this hearing?

Q No--prior to the meeting at which -- prior to

63 September 28.

A Yes--I was given the same report the same time everybody else was given the report.

Q You all got it in the meeting?

A I didn't have any advance.

Q You didn't have any advance copies.

A No, I did not.

MR. FORER: I would like to ask for production of the item listed as Item 6 in our notice of deposition-- that is, the notice of annual meeting of stockholders dated September 28, 1966 -- wait,hold on--before that --

I would like to ask for Item 4.

MR. COX: Mr. Boudin, can you respond to this request?

MR. FORER: Let me read this in the record.

Item 4 calls for all data submitted to the auditors of Kay Jewelry Stores, Inc. by Joel S. Kaufman for the purpose of preparing said audit of September 28, 1966.

MR. BOUDIN: The only data that we have been able to locate is in the posession of Joel Kaufman --

MR. FORER: We can ask him for that.

MR. BOUDIN: -- whom we would prefer you ask.

MR. FORER: Let me ask for --

MR. REIN: Off the record.

(Discussion off the record.)

MR. FORER: Back on the record.

BY MR. FORER:

Q Prior to this meeting of September 28, 1966, did you know what data Mr. Joel Kaufman had given to the auditors?

A No.

MR. FORER: I would like to ask for production of items 6 and 7.

MR. COX: I take it that those items call for material sent to stockholders.

MR. FORER: Six is notice of annual meeting, dated September 28, 1966.

MR. COX: All right. Here is a copy of the notice of the annual meeting of stockholders, September 28, 1966.

MR. FORER: Off the record.

(Discussion off the record.)

MR. FORER: Back on the record.

Will you mark this Plaintiff's Exhibit number 6 for identification, and mark that 7.

(The documents referred to above were marked Plaintiff Depositions Exhibits No. 6 and No. 7 for identification.)

MR. FORER: Off the record.

(Discussion off the record.)

65 MR. FORER: The parties stipulate that Plaintiff Depositions Exhibits number 6 and 7 for identification are true copies of what they purport to be on their face.

MR. COX: We so stipulate.

MR. FORER: Let the record also show that additio copies have been delivered to counsel for the plaintiff.

Off the record.

(Discussion off the record.)

MR. FORER: Back on the record.

MR. COX: Off the record.

(Discussion off the record.)

BY MR. FORER:

Q Now, I want you to take a look at page 4 of Plaintiff's Exhibit 6 for identification, the paragraph beginning "On July 1, 1966...". It's the paragraph just above the Heading "Employee Qualified Stock Option Plan".

A Did you have a question?

Q Have you read it?

A Yes.

Q My question is this --

Prior to sending out this notice of September 28, 1966 was any other information sent to the stockholders regarding the acquisition of these shares from Joel Kaufman?

A Not to my knowledge.

Q Do you believe that this was the first item of

66 information sent to the shareholders?

A General stockholders--I believe so.

Q General stockholders.

A Yes--I believe so.

Q Look at Exhibit 7 for identification. There is also a reference to this acquisition, on page 4.

Am I correct in saying that between the notice which is marked Exhibit 6, the notice of the meeting of September 28, 1966; and the notice which is marked Exhibit 7, there was no other material sent to the stockholders concerning this acquisition of shares from Joel Kaufman?

A No -- wait just a minute. You got me crossed up. You gave me sixty-eight first -- you asked me if there was any other notice.

Q Is that sixty-eight or sixty-six?

A You gave me sixty-seven first and you asked me if there was any other notice and I said no, but obviously --

Q No, I didn't mean that.

A That is what you said.

Q On September 28, 1966, the stockholders were informed about this acquisition as appears on Page 4.

A Correct.

Q Then they were given some information about it in the notice relating to the annual meeting September 27, 1967 which is Plaintiff's Exhibit 7; is that correct?

67 A That is correct.

Q Inbetween these two notices there were no other notices sent to stockholders.

A That is correct. The way you asked the question you put me in a hole.

Q I think now we can button up the cost and so forth.

In Plaintiff's Exhibit 7, the paragraph dealing with the acquisition of these shares from Joel Kaufman -- if you will take a look at that --

Are these figures correct in that, that the aggregate book value on February 28, 1966 of the shares acquired by the company was $498,420.67? Is that correct?

A Correct.

Q Is it correct that the acquisition cost to the company of all the shares acquired from Joel Kaufman was $397,200.29?

A That is providing there is no adjustment because that one thing points out there was an outstanding bill.

Q This is the adjusted price.

A If that is the adjusted price then that is right.

Q Is it correct, that as of this total consideration, the sum of $205,330.03 was regarded as representing the price paid by Joel Kaufman for the shares in the judicial sale?

A That is correct.

68 Q And it is also correct; is it not?--that the sum of $191,870.26 was considered the portion attributable to the shares purchased from Joel Kaufman of all his expenses incurred in acquiring such shares.

A Correct.

Q Including attorney's fees, accountant's fees, witness fees, travel and other miscellaneous expenses.

A Correct.

MR. FORER: We have completed; thank you very much.

MR. COX: Mr. Shea, do you have any questions?

MR. SHEA: No.

MR. COX: I think I have no questions of the witness, but I think Mr. Boudin --

MR. BOUDIN: I have not a question.

MR. COX: Mr. Boudin has asked me to observe--and I think the observation should be made--that on Exhibit -- the schedules which are part of Exhibit 4, that we believe that on the first of those schedules, to wit, Schedule A, at the foot of the page there are some figures that were added to this schedule after the board of directors meeting at which the schedule was presented and which were therefore not on the schedule when it was shown or delivered to the members of the board.

MR. FORER: Can you indicate what they are?

MR. COX: Can you tell him what ones we think that

69 may be true of on Schedule A?

MR. BOUDIN: The figures below the number of $534,226.31.

MR. COX: Schedule A.

MR. FORER: I see.

MR. COX: What about the other schedules?

MR. FORER: Those figures below the figure related to "Total Cost of Purchasing All Securities from Estate of Robert D. Kaufmann, Deceased."

MR. BOUDIN: That is correct.

And Schedule B--the figures below the figure -- $400,729.09.

MR. COX: The figures below that line.

MR. FORER: Were later additions.

MR. COX: Yes.

MR. FORER: Those later additions were not presented to the board of directors.

Anything else?

MR. BOUDIN: Turning to Schedule 5 of Exhibit --

MR. FORER: Exhibit 5.

MR. BOUDIN: -- there may also be additions on that schedule below the figure $6,570.00.

MR. REIN: We do not know that Exhibit 5 was ever presented to the Board.

MR. BOUDIN: That is correct. This appears to be

70 a later addition to Exhibit 5 itself.

MR. FORER: Anyway, if you compare that with what the report to the stockholders shows they jive I believe.

THE WITNESS: That makes it up.

MR. FORER: In other words, it is quite clear that Exhibit 5 was a final adjustment I think.

MR. COX: I have no questions.

MR. SHEA: I have no questions.

THE NOTARY: Do you waive signature?

MR. COX: I think Mr. Kaufman would like to read this. And do you want it signed?

MR. FORER: He may as well.

MR. COX: We will not waive reading and signature.

(Whereupon, at 1:25 p.m. the taking of the deposition of CECIL D. KAUFMAN was concluded; and the proceedings recessed for lunch, to resume at 2:00 p.m.).

- - -

I have read the foregoing pages which contain a correct transcript of answers made by me to the questions therein recorded.

_________________ 1969 ______________________

CECIL D. KAUFMAN

- - -

AFTERNOON SESSION

71

2:00 p.m.

Thereupon,

JOEL S. KAUFMAN

a witness of lawful age, having been previously duly sworn by the notary public and, being examined by counsel, testified as follows:

DIRECT EXAMINATION

BY MR. REIN:

Q Mr. Kaufman, will you state your name and address.

A Joel S. Kaufman. You want my home address or office?

Q I don't care; either one.

A 1328 New York Avenue, Northwest, Washington.

Q You are a defendant in this case, are you not?--Mr. Kaufman.

A Yes.

Q Are you an officer of Kay Jewelry Company?

A I am.

Q What office is that?

A Treasurer.

Q How long have you held that office?

A Since the inception of Kay Jewelry Stores, Inc.

Q When is that?

A I believe it was 1953.

72 Q Are you also a director of Kay Jewelry Company?

A I am.

Q How long have you been a director of Kay Jewelry Company?

A The same length of time.

Q You are related to Robert D. Kaufman.

A He was my brother.

Q When did he die?

A April of 1959.

Q At the time of his death was there a probate proceeding that you are acquainted with?--someone filed a probate to prove a will?

A After his death, yes.

Q Who filed that?

A I believe the filing was by Walter Weiss.

Q Under this will, who was to take the property of Robert D. Kaufman?

A With the exception of one corporation I believe Weiss got the entire balance.

Q And did you institute a will contest to change the validity of that will?

A Yes.

Q Did you institute that by yourself or did someone join with you in it?

A My brother, Aaron.

73 Q And is it true that if you succeeded in setting that will aside that you and your brother, Aaron, would inherit Robert Kaufman's Estate?

A Well, there were several wills that had to be probated in Surrogate Court.

The second will called for my children to receive half the Estate and Weiss to receive the other half.

Q And you are contesting that will, too.

A Beg your pardon?

Q Are you contesting that will, also?

A Yes.

Q Is it fair to say that the purpose of this litigation was to have the Estate, and the property in that Estate of Robert D. Kaufman come to you and your brother and your children rather than to Mr. Weiss?

Was that really the nature of the litigation or your interest in the litigation?

A Well, there were several factors that made me litigate.

Mr. Weiss had taken charge of my brother's affairs for about ten years prior to his death* and there was just an impossibility for me to live with Mr. Weiss in anything; he was an impossible man to deal with.

Q Will you answer the question.

The effect of the litigation would be for the

* Added by May 12 letter

74 property of your brother's Estate to go to you and your brother and your children; is that correct?

MR. SHEA: May I suggest the witness has already said the second will would result in fifty percent to Weiss and fifty percent to his children, to Joel's children.

BY MR. REIN:

Q Are you contesting that will, also?

A I am.

Q If you succeed in setting that will aside, how would the Estate be left?

A You mean the next will in line?

Q Yes.

A I don't know what this is, other than eventually Mr. Weiss is not mentioned in any will other than a forgiveness of debts.

Q And who are mentioned eventually?

A It would be my brother, Aaron, and my two children.

Q And yourself?

A No.

Q Did you retain a law firm for the purpose of instituting this will contest?

A Yes.

Q Who did you retain?

75 A Lord, Day and Lord.

Q Did they have an associate counsel with them?

A Yes.

Q Who was that?

A An attorney by the name of Milton Levy.

Q Did you retain them or did you and your brother, Aaron, retain them?

A Are you referring to Lord, Day and Lord?

Q Lord, Day and Lord.

A My brother, Aaron, and myself retained them.

Q As I understand it; Lord, Day and Lord brought in Mr. Levy. Is that correct?

A That is correct.

Q What arrangements did you--you and your brother, Aaron, have with Lord, Day and Lord, or with Mr. Levy concerning this will contest? Did you come to some understanding with them about the nature of your feelings at the time of the retainer?

A No. The only understanding at the time was that Mr. Milton Levy -- this was at that time --

Q What time did you refer to?

A It's awfully difficult for me to remember.

Q May of 1959?

A This was in 1959 I guess.

Q You instituted the contest shortly after your

76 brother's death and your brother died on April 18?

A I don't remember whether it was May or June. I can't be specific. At that time Lord, Day and Lord informed me they would have to bring somebody else in. Mr. Milton Levy was brought --

Q What arrangement did you have with Lord, Day and Lord?

MR. SHEA: I wonder if the witness is finished.

THE WITNESS: I haven't finished. The only arrangement was that Milton Levy would conduct the actual courtroom proceedings and he was on -- What do you call it?

MR. FORER: Contingency.

THE WITNESS: -- for one-third of the Estate which was later changed.

BY MR. REIN:

Q Did you have any agreement with Lord, Day and Lord to pay them fees?

intended at

A I ~~didn't intend~~ to pay them fees.

I might say at Lord, Day and Lord Harry Rutick had represented me personally in many tax matters and various other things. He was a member of the firm of Lord, Day and Lord, and I more or less threw myself in Mr. Rutick's lap.

Q Was it understood they would bill you for the basis of the work, or what they considered to be a fair fee

* May 12 letter)

77 for what work they did?

A That is correct.

Q I think you have heard the testimony that in connection with your brother's Estate there were certain stocks held in subsidiaries of Kay Jewelry and these stocks were put up for public auction.

When did you first learn this stock was going to be sold at public auction?

A I think it was back in 1965 that Mr. Graf, who had been appointed temporary receiver for the Estate of Robert --

Q Temporary administrator.

A Temporary administrator--excuse me -- and I think somewhere along the line somebody at Lord, Day and Lord informed me that he was going to petition the Court to sell the assets.

Q Did you ever see a copy of that petition?

A I might have.

Q Was that petition approved by the Court?--the petition to sell the stock at public auction.

A Yes.

Q Do you know when the petition was filed?--about when?

A No. You mentioned some date earlier.

Q The Court records say May 13, 1965.

78 Would it be fair to say this matter was brought to your attention shortly thereafter?

A Yes.

Q Did you ever see a copy of the order of the Court approving that application and ordering the sale of securities?

A I am pretty sure I must have.

MR. REIN: Would you mark that as Exhibit 8.

(The document referred to above was marked Plaintiff Deposition Exhibit No. 8 for identification.)

BY MR. REIN:

Q I show you what has been marked as Plaintiff's Exhibit 8 which is headed proceedings at Surrogate Court of the State of New York and it is indicated it was filed on April 29, 1966.

I ask you if you recognize that as an order of the Court approving the petition of temporary administrator for the sale of stocks.

A I think I saw this--yes.

MR. REIN: Can we--subject to whatever check you want to make--agree that this is a copy of it?

MR. SHEA: Sure.

MR. REIN: Let me show you at the same time -- would you mark this 9, and 10.

79 (The documents referred to above were marked Plaintiff Depositions Exhibits No. 9 and No. 10 for identification.)

BY MR. REIN:

Q I show you what has been marked Exhibits 9 and 10; Plaintiff's Exhibit 9 is headed report of sale in the matter of application of Arthur W. Graf; and 10 is the order confirming sale; and ask you whether you recall seeing those documents and can identify them.

A I have seen this.

Q By this you mean Exhibit 9.

A I am sorry--yes.

I don't believe I would have seen this one but --

MR. REIN: Can we agree that 9 and 10 are accurate copies?

MR. SHEA: Do you know these are the originals?

MR. REIN: These are copies.

MR. SHEA: You know they are true copies?

MR. REIN: Yes.

THE WITNESS: Off the record.

(Discussion off the record.)

MR. REIN: It is stipulated that Exhibits 9 and 10 are true copies of 1.--the report of sale, which is 9; and 10--the order confirming the sale.

80 BY MR. REIN:

Q When did you first discuss with any official of Kay Jewelry the possibility of the company buying the securities or some of the securities which were in the Robert Kaufman Estate?

A To make a lengthy answer--if I may--my cousin and myself have had a very close relationship over the course of years; more like brothers than cousins.

It isn't unusual for me to go in and discuss something with him or him to come in my office to discuss something with me. This happens generally when two people are in the same business together.

I think the first time I discussed with him--and this was not only business of Kay Jewelry Company--was back at the time of the first trial in 1959 before Surrogate Cox, in New York; there was a discussion of settlement.

Q When was that?--and you discussed with him the possibility of Kay Jewelry buying?

A I didn't discuss with him about Kay Jewelry buying it.

Q My question -- When did you first discuss with any official of Kay Jewelry the possibility of Kay Jewelry buying securities in the Robert Kaufman Estate?

Not just the Estate; generally when did you first discuss that specific question.

A I can't specify this. At that time this was on all assets of the Estate. It wasn't just Kay Jewelry.

Q Did you ever have any discussion with Kay Jewel[illegible] buying anything other than these securities?

A No.

Q Leaving aside any discussions you might have had with your cousin about the Estate, can you direct yourself to the specific discussion of when you first had a discussion with your cousin with respect to Kay Jewelry Comp[illegible] buying any of the securities in the Robert D. Kaufman Est[illegible]

A I think the first discussions could have taken place when there was a hearing with regard to Graf's petition that the assets be put up for sale.

Q In other words, it would be some time after May [illegible] of 1965; this is correct--right?

A I believe so.

Q Your discussion was with whom?--with your cousin?

A With my cousin.

Q Did you ever discuss this question with any other official of Kay Jewelry?

A Simon Hirshman.

Q Did you discuss it with him in his capacity as an official of Kay Jewelry or as your private counsel or can you separate the two?

A I don't think I can separate the two. Si has been

closely associated with me ever since I have been in the retail business and we have been very good friends. I have never differentiated as to whether it applies to Kay Jewelry Company, personally, or any other way.

Q To make my question clear--I don't want to go into any question of your lawyer privilege; however if you were having a discussion with Mr. Hirshman in his capacity as an official of Kay Jewelry Company I don't think you are entitled the privilege.

I am asking you to tell me whether you think it was a lawyer-client discussion or a discussion with Mr. Hirshman as an official of Kay Jewelry.

A I think it was both. That's the only way I can describe it. I have never differentiated and said now we will talk about Kay Jewelry Company, or we will talk about this personally. It is impossible to break this down.

Q Can you tell me, if you don't recall exactly when it was, what the discussion was with him, the first discussion you had?

A You are referring after May of --

Q After May 13--yes. After the administrator had filed a petition to put the stocks up for public auction.

A Well I think I told Mr. Hirshman and my cousin, Cecil Kaufman, that I was going to bid in this, and previously had no idea of how much; when I first started I

83 had no idea of the tremendous expenses that I had undergone and at that time I told them that I was going to bid it in and if there was competition on it I was going to see the price would be bid up to where if somebody wanted to buy it they would have to pay for my expenses that I have had.

Q What did they say?

Have you completed your full discussion?

A Yes. I told them what I was going to do.

Q Did they make any comment?

A I don't think so; I can't recall.

Q Was the question raised at that time that maybe the company ought to acquire these stocks?

A No. This was just a voluntary statement on my part.

Q When did a discussion come with respect to the question of the company buying, acquiring the stock?

A I really don't know.

You are talking about prior to the actual--to my actually getting these securities?

Q Yes--prior to your getting the securities; did you have any discussion with respect to the company acquiring the securities?

MR. SHEA: Acquiring from Joel?

MR. REIN: Acquiring it in any fashion.

THE WITNESS: There wasn't any as far as I was

concerned because I told them what I was going to do.

BY MR. REIN:

Q I show you what has been marked for identification as Plaintiff's Exhibit 1, which is a meeting of the board of directors of Kay Jewelry on January 25, 1966.

Did you attend that meeting?

A Yes.

Q Was there any discussion at that meeting with respect to the corporation acquiring securities either from you or from anybody else, securities held in the Estate of Robert Kaufman?

A I assume you are referring to this page 2--this statement of number of inquiries from minority stockholders; is that correct?

Q Yes.

A I don't believe this was a primary base. There had been a number of inquiries from other minority stockholders.

Q Was there any mention made at this meeting of the subject of the securities in the Estate of Robert Kaufman?

A There could have been; I imagine there was.

Q Had you discussed that question with your cousin prior to the meeting?

A I can't recall. I assume I had--yes.

Q You had?

85 A Yes.

Q When had you discussed with him prior to the meeting?

A I wouldn't remember.

MR. REIN: Could you give him a copy of his Answer.

MR. SHEA: Yes.

BY MR. REIN:

Q I wonder if you would read Paragraph 7 of the Answer which you filed to the Complaint in this case.

A That is correct.

Q That is a correct statement?

A Yes.

Q And you wish to correct your previous testimony.

A Yes.

Q Had you discussions with your cousin on this subject prior to the meeting of January 25, 1966?

MR. SHEA: I think he answered that he had.

THE WITNESS: I had discussions since 1958.

BY MR. REIN:

Q Specifically had you discussions with your cousin with respect to whether or not you would purchase these securities at public sale and the securities would then be purchased by the company?

A I think the only thing that I had mentioned previously that I had said to both Mr. Hirshman and Mr. Kaufman

that I was going to be the bidder on this.

Q In other words, you are saying to us now that you had no discussion with your cousin on the question of whether the company would buy the securities from you.

A I think it was -- we probably did, yes; I think it was always assumed I didn't want to hold on to a lot of minority interest.

Q Was it assumed or did you have a discussion with him about it?

A I don't -- I think yes we had a discussion about it because I was not going to find my children or myself in a position that we were back in 1953 where we each owned a little bit in each company.

Q Did you have a discussion about the price that would be paid to you for those securities?

A No, because I don't think at that time we knew the price; I am not sure.

Q Did you have a discussion about the formula or the method at which you would arrive at a price?

A I could have said to him that he could have them at my exact cost plus expenses.

Q Did you?

A I think I must have--yes.

Q In Item 1 of the notice to take your deposition we asked you to supply any and all notes and memoranda in your

07 possession or control, of the conversations or discussions between you and your cousin as referred to in this Paragraph 7.

Do you have any such notes and memoranda?

A I thought you were referring to Paragraph 1.

Q Paragraph 7.

THE WITNESS: Would you mind reading that question.

MR. SHEA: (Not within the hearing of the Reporter.

MR. REIN: It is unnecessary. Counsel says you have no notes,memoranda as requested.

BY MR. REIN:

Q Paragraph 7 states that subsequent to January 25, 1966 you had conversations with your cousin on this subject. Can you tell me when those conversations took place?

A No I can't tell you when those conversations took place.

Q Can you tell me what was said?

A I don't believe anything; I just can't recall.

Q Did you ever have a discussion with your cousin as to whether or not the company would buy these stocks, securities directly at a public auction in its own account?

A I don't believe so. I have always been of the opinion -- that I was sort of conceited, what-not -- that I was going to bid those stocks, all of them.

Q Did your cousin ever ask you to buy them for the

Kay Jewelry Company?

A No.

Q Did he ever indicate to you that the Kay Jewelry Company was interested in acquiring the stock for itself?

A After this?

Q Before, after, at any time.

A Yes.

Q When was that?

A I wouldn't know.

Q Did he indicate why it did not want to get it directly?

A No--oh yes--I am sorry, excuse me.

There were discussions at that time between Mr. Hirshman and Mr. C. D. Kaufman.

Q At which you were present?

A No, I was not present.

Q There was never any discussion with you about it.

MR. FORER: About what?

MR. REIN: About the subject of the company acquiring the stock directly at public auction.

THE WITNESS: I can't recall.

BY MR. REIN:

Q In the January --

MR. SHEA: I don't think that was your last question.

89 MR. REIN: Well --

MR. SHEA: I thought you had gone beyond to another question; go ahead.

BY MR. REIN:

Q At the January 25 meeting, did you make any report yourself directly to the directors at the meeting with respect to these stocks being put up for public auction?

A I tell you, throughout the years, ever since my brother, Bob, passed away, at every directors meeting, every director was familiar with this law suit.

A number of them were personal friends of both Bob and myself. They asked me how is the case coming on and so on.

I could have told them if it had already been determined to put them up for sale; at that time that it was going to be up for public auction.

Q Do you recall that you did or didn't?

A I don't recall; no I don't recall.

Q I would like to turn your attention to what has been marked Plaintiff's Exhibit 2 for identification, which is the minutes of the meeting of July first, 1966, and on page 2 I call your attention -- "It was reported that Joel S. Kaufmann, member of the Board, had recently purchased, at Public Sale ordered by the Surrogate's Court," -- et cetera --

Have you read that?

90 A Yes.

Q Did you make that report or did someone else make it?

A I think somebody else made it.

Q Who?

A I don't recall.

Q Had you previously given anybody any data on the basis of which they can make the report? This is a report, something that you did.

A That is correct. Look--it was no secret about it. I purchased the assets of the Estate at that time and --

Q When did you purchase the assets of the Estate?

A On June 6 or 7 of sixty-six.

Q Did you ever turn any figures over to anybody prior to the meeting of July first, 1966?

A I could have. I didn't attend -- I mean I left this meeting.

Q Prior to the meeting of --

A Prior to the meeting I am sure Mr. Hirshman was familiar with the expenses. I think I told Mr. Rihtarchik of what it had run. The figures weren't in so I couldn't give an accurate amount.

Q Had anybody from the corporation met with you in an official capacity and said to you they were designated by the company to meet with you to find out what you paid for it

91 and what your expenses were?

A I don't know. There was no secret about it.

Q What occurred at that meeting?

A I don't know but Mr. Hirshman was up with me when I put the bid in.

Q Mr. Hirshman was with you --

A It was --

Q -- at the public auction.

A It was run -- That is correct.

It was run in the Wall Street Journal. There was no secret what I was paying for it.

As far as any expenses, I was not altogether sure myself at that particular time; I had some idea.

Q At the time you purchased the securities on June 7, did you have an understanding that you were going to sell the subsidiaries stock, that is subsidiaries of Kay Jewelry to the company?

A I think so--a tacit understanding.

Q I call your attention to the paragraph on Page 3, where it is stated -- the same exhibit, Plaintiff's Exhibit number 2 -- where it is stated that the Board -- with yourself Mr. C.D. Kaufman and Mr. Donald Kaufman abstained -- voted that they would purchase these stocks at an aggregate sum not to exceed $411,000.

Do you know the basis upon which that figure was

arrived at?

A I recall something now. I had given a preliminary statement of what my expenses had been prior to that, and they were not complete -- to I think John Rihtarchik or James Stoner; of what my expenses were.

I was not at the meeting when it was passed. They had not called me back in the room so I didn't know until later on.

Q But you had prior to this meeting discussions with Mr. Rihtarchik in which you had given him some certain information.

A After I had acquired the stock.

Q Immediately after you acquired the stock?

A (No response.)

Q A day or two later?

A Some time within the month that passed between the acquisition of the stock and the meeting.

Q Was it a week after?

A Possibly.

Q Did it come to your knowledge that a special committee had been appointed to prepare an audit?-- referring your attention -- I am sorry -- again to Plaintiff's Exhibit number 2; in the paragraph referring to the fact that there was the exact amount to be paid to you to be determined upon an audit.

93 Was any particular group appointed to conduct that audit?

A Yes.

Q Who was that?

A Donald Hudson, Jack Rihtarchik and James Stoner.

Q Did you meet with them?

A I didn't meet with them formally. John Rihtarchik--I would just take all invoices, expenses and turn things over to Jack Rihtarchik.

Q Do you have copies of what you turned over to Mr. Rihtarchik?

MR. SHEA: I will show you what we have.

MR. FLYNN: What we have in response to the request in your notice of deposition which we will produce for you at this time.

There are 38 pages of documents and I will not trouble to read the titles. They are schedules and they are statements of legal fees and that sort of thing.

This is what Mr. Kaufman has been able to find in his files in response to all of the requests in your deposition notice.

MR. REIN: Let me ask you -- Are you able to represent--on behalf of Mr. Kaufman--that is what he gave to the audit committee?

MR. FLYNN: I am not able to represent that at all;

that you have to ask Mr. Kaufman.

MR. REIN: May I have a few minutes.

MR. FORER: Off the record.

(Discussion off the record.)

BY MR. REIN:

Q I show you a document--a number of documents--the first sheet -- memoranda to Mr. Jack Rihtarchik from Joel S. Kaufman. Attached to that are a number of what appear to be invoices from Lord, Day and Lord; all from Lord, Day and Lord -- and I ask you whether this is the material that you gave to Mr. Rihtarchik at the time to show the expenses you had incurred in connection with the Estate.

A This is correct.

MR. FORER: Let's mark it now.

MR. REIN: This will be Plaintiff's Exhibit number 11.

Let's identify what I have marked Plaintiff's Exhibit number 11. I will count the number of sheets.

It starts off with a memorandum dated August 15, 1966, memorandum to Mr. Rihtarchik from Joel S. Kaufman.

Then I have attached to that what appears to be a bill from Lord, Day and Lord dated August 13, 1964.

After that a bill to Joel Kaufman dated August 30, 1960 which runs for two pages.

And a bill dated August 14, 1951.

MR. FLYNN: 1961 I believe.

MR. REIN: 1961.

A bill dated July 10, 1962 which runs for two pages -- it runs on for three pages.

A bill dated August 13, 1964 which is one page.

A bill dated May third, 1966 which runs on for three pages.

Will you mark that Plaintiff's Exhibit 11.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 11 for identification.)

BY MR. REIN:

Q You have testified that the documents contained in Plaintiff's Exhibit 11 are data that you submitted to the auditors as a basis upon which they made up their report to the board of directors as to expenses of cost of acquisition.

Did you submit any other data?

A Yes.

Q What other data did you submit?

A I submitted -- are you talking just applying here? -- I submitted bills and so on; whatever I had that was attached to this.

Q I am referring not just to the coversheet.

A I am sorry.

Q I am referring to all of these sheets. Examine them.

And the question I want to ask you -- The number of sheets which include the coversheet and bills from Lord, Day and Lord--was that all the data you submitted to the auditors or did you submit anything else in addition to that?

A I submitted other bills in addition to this.

Q What bills did you submit in addition to that?

A It is just impossible for me to remember exactly what I did submit.

Q Where are they?

A (Shakes head.)

Q Did you keep them or did the auditors keep them?

A As far as these bills?

Q The bills--What happened to the material which you submitted to the auditors?

A I gave everything to Mr. Rihtarchik that I had and that is all I know about them.

Q Did he ever return them to you?

A I did take Mr. Rihtarchik up to M.B. Hariton & Company to go over my personal situation with regard to this money that was coming in so that I would have no trouble in filing my tax return.

97 Q And who are M. B. Hariton & Company?

A They are auditors, CPA's.

Q Where are they located?

A 17th Street.

MR. SHEA: Can I say this to you off-the-record.

(Discussion off the record.)

MR. REIN: Let's go back on the record.

BY MR. REIN:

Q Can you tell me, Mr. Kaufman, if you can recall what other data you did turn over?--as best you can recollect,

A As best I can recollect I turned over all statements and invoices that I had.

Q From whom?

A From various attorneys, auditors, et cetera, plus personal records of expenses that I had incurred during the past, since 1958.

MR. FORER: Off the record.

(Discussion off the record.)

BY MR. REIN:

Q Mr. Kaufman, in connection with the material that you presented to the auditors, did your accountant, M. B. Hariton & Company prepare any material to be presented to the auditing committee?

A No ~~I~~ they didn't.

MR. FORER: Off the record.

[illegible]

(Discussion off the record.)

BY MR. REIN:

Q Will you please say what you said off the record on the record.

A All right.

MR. SHEA: Just answer his questions.

BY MR. REIN:

Q You were explaining to me the nature of the covering document on Plaintiff's Exhibit 11.

Would you continue your explanation as to what that represents.

A On August 15 I submitted a memorandum to Jack Rihtarchik that I had prepared based on invoices, et cetera, of approximately my expenses and my brother Aaron's expenses for the -- since the will contest was entered.

At a later date, at a meeting at which I was not at; it was between Donald Hudson, James Stoner and Jack Rihtarchik --

Q Don't tell me about a meeting at which you were not,

A -- these expenses were subsequently adjusted.

Q On the basis of further information which you gave?

A Further information which I gave.

Q When did you give the further information?

A What was the date of the final --

Q September 28 I understand.

99 A Yes--between the July meeting and the next meeting. They had to have an approximation of this thing for the July meeting and subsequent to September there were adjustments made and corrections and so on.

Q In what form did you give that information upon which the adjustments were made?

Did you submit anything in writing?

A I submitted whatever was available in writing.

Q Can you find a record of that any place?

A (Shakes head negatively.)

MR. FORER: The answer is no.

MR. REIN: I think I have no choice --

THE WITNESS: No -- excuse me.

BY MR. REIN:

Q I show you a document--I am not going to mark any of these until after they have been identified because they may not be identified.

I show you a document which has the heading Lord, Day and Lord.

Can you identify that and tell me what it represents?

A This is information from my own personal records of money I paid out to Lord, Day and Lord in connection with the Estate; also monies that were paid out by my brother Aaron Kaufman; further additional monies that were paid out

by the Kaufman Company.

Q Did you prepare that?

A This was taken from my own records and sent to -- this was taken from my own records and given to Jack Rihtarchik and also a copy was sent to my auditor.

Q It was prepared for you?

A It was prepared by Mrs. Hutton in our office who has handled my books for years.

Q And you gave that to Mr. Rihtarchik or had it sent to him.

A That is correct.

MR. REIN: Mark as Plaintiff's Exhibit number 12 the document which Mr. Kaufman has just identified.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 12 for identification.)

BY MR. REIN:

Q I would like to show you two sheets, handwritten ledgers; one headed legal expenses, Joel Kaufman; the other legal expenses, Aaron P. Kaufman. They are stapled together--and ask you whether you can identify those two sheets.

A This is a sheet that was taken from my personal books and my brother Aaron's personal books of legal expenses from March 9, 1959 through December 15, 19 -- I am

101 sorry -- through January--through 1964.

Q And were they given by you to Mr. Rihtarchik in connection with the audit?

A I believe those were prepared by Mrs. Hutton and given to Mr. Rihtarchik and Mr. Bacus at Mariton & Company.

MR. REIN: I would like to have that marked as Plaintiff's Exhibit number 13.

(The document referred to above was marked Plaintiff Deposition Exhibit No. 13 for identification.)

MR. REIN: Those are the two sheets which are headed legal expenses, Joel Kaufman and legal expenses, Aaron P. Kaufman.

BY MR. REIN:

Q I show you a sheet which is headed Joel Kaufman--analysis of costs R. D. Kaufman Estate assets. Can you identify that?

A This was something that I believe that Mr. Bacus prepared.

Q Who is Mr. Bacus?

A M. B. Mariton & Company.

Q Did he prepare it at your direction?

A To the best of my knowledge the first time I saw this is when he sent this to me. ~~offer in.~~

Q Was it prepared for the purpose of being presented

? per May 12 letter

to the audit committee?

A No--this was -- no, this was from my personal information.

Q Let me make this clear.

Was this prepared for your own personal use or do you know what purpose it was prepared for?

A Yes. I think it was prepared for my personal use because there are three other items that had nothing to do with Kay Jewelry Stores.

Q And it was not presented to the audit committee; is that correct?

A That is correct.

MR. REIN: Will you mark that as Exhibit 14 and it is a document headed Joel Kaufman, an analysis of costs, R.D. Kaufman Estate assets, June 16, 1966 which has been identified by Mr. Kaufman as a document prepared by his accountant for his own use.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 14 for identification.)

MR. REIN: Will you mark this 15.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 15 for identification.)

103 BY MR. REIN:

Q I show you what has been marked as Plaintiff's Exhibit number 15--which is headed -- stock of RDK Estate -- which is a ledger sheet and ask you if you can identify that.

A Yes--this is a ledger sheet from my own personal books.

Q Was that presented to the audit committee?

A No, this was not. This was my own records.

MR. REIN: Mark this 16.

MR. SHEA: What are you marking 16?

MR. REIN: Estate of R. D. Kaufman, analysis of all costs--R.D. Kaufman Estate Assets.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 16 for identification.)

BY MR. REIN:

Q Can you identify that for me and tell me what it is?

A I believe this is something that was prepared by M. B. Hariton & Company for my personal information. I am not too sure of this; whether it was presented to the committee or was just presented for my own use. I have to study it more.

Q Right now you can't tell whether it was presented or not.

A I don't really know who prepared this.

Q Or for what purpose.

A I think it was prepared to show what was still unpaid.

Q Let me just ask you one question.

There are three columns on this--one is Joel S. Kaufman and the other is Aaron P. Kaufman; there is a column called Kaufman Company.

Can you tell me what Kaufman Company is?

A Kaufman Company is a corporation that is now owned by my brother, Aaron, and myself.

Q Does it have any connection with Kay Jewelry Company?

A Other than owning some stock in Kay Jewelry Company no connection.

MR. REIN: Exhibit 17.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 17 for identification.)

BY MR. REIN:

Q I have marked -- Estate of Robert D. Kaufman, analysis of expense reimbursement calculated as part of sales price -- as Plaintiff's Exhibit 17. It is two sheets.

Can you identify that for me?

A I believe this is information from my own

105 personal use prepared by my auditors.

Q Was that submitted to the audit committee of Kay Jewelry Company?

A I don't believe so.

MR. REIN: Will you mark this 18.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 18 for identification.)

(Whereupon, there was an off-the-record discussion.)

MR. REIN: Let's go back on the record.

BY MR. REIN:

Q Directing your attention to Plaintiff's Exhibit 17 which is headed on the top sheet--it is headed Estate of Robert D. Kaufman, analysis of how expense reimbursement was calculated as a part of the sales price and there were two sheets stapled together. You wanted to testify that the first and second sheets -- Why don't you examine this first sheet and the second sheet?

A I believe that sheet number 2 was prepared from information that had previously been given to the audit committee.

I believe this sheet was --

MR. SHEA: This sheet?

THE WITNESS: Sheet number 1 was prepared by my own auditor.

Q Do you have any explanation as to why the two sheets are stapled together?

A The only explanation I can see is that the total expenses on sheet number 2 is carried over to sheet number 1.

Q You mean it should be the other way around?

(Whereupon, there was an off-the-record discussion.)

MR. REIN: Let's drop it.

BY MR. REIN:

Q Let's go on to Plaintiff's Exhibit 18. It is Joel S. Kaufman, 1966 sale of assets purchased from R. D. Kaufman Estate.

Can you tell me what that is?

A I believe this was a paper prepared by my own auditor showing items that were showing which corporations the stock was sold to.

I am sorry -- showing the receipts of the sale of assets of the Estate of Robert Kaufman.

Q Was this material presented to the audit committee?

A No.

MR. REIN: Mark this Plaintiff's 19.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 19 for identification.)

BY MR. REIN:

Q Can you identify that? It says off on the left-hand

107 column AS and T Co.

A I believe this is a sheet that was prepared by my auditor from Mrs. Hutton--from my own books.

Q Was this information presented to the auditing committee?

A No.

MR. REIN: Number 20 -- which is a document headed Kay Jewelry Stores, Inc., payment to Joel S. Kaufman for stock of subsidiary companies purchased from the Estate of R. D. Kaufman.

(The document referred to above was marked Plaintiff Depositions Exhibit 20 for identification.)

BY MR. REIN:

Q Can you identify that?--Plaintiff's Exhibit 20 -- Do you have it before you?

A This I believe was the final settlement sheet made up by the audit committee.

MR.FLYNN: Off the record.

(Discussion off the record.)

MR. REIN: Let's go on to Plaintiff's Exhibit number 21 which is three sheets stapled together and the first is headed Estate of R.D. Kaufman -- I am not saying they are all one document; I am just saying they are stapled together.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 21 for identification.)

BY MR. REIN:

Q If it is difficult, let's take up the first one of the three sheets. See if you can identify that.

A I believe that all three of these pertain to an adjustment between my brother, Aaron, and myself as to costs, et cetera, that I had asked Mr. Bacus to make up.

Q Was this material presented to the auditing committee?

A No.

MR. REIN: Off the record.

(Discussion off the record.)

MR. REIN: Let's mark that as 22.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 22 for identification.)

THE WITNESS: These are expenses from my own personal record for expenses while traveling to New York in connection with the law suit.

BY MR. REIN:

Q Were they presented --

A There also were some payments -- a large payment to Lord, Day and Lord for legal fees and expense; also a

109 a payment to Milton Levy. The rest were expenses entailed in the pursuit of this suit.

Q When you say pursuit -- of what suit?

A I didn't mean that; that is a wrong word.

Q You mean the litigation involving the Estate?

A The litigation involving the Estate.

Q Was that data submitted to the audit committee?

A Yes.

Q In that form?

A (No response.)

Q Were those documents or originals or copies of these documents submitted to the audit committee?

A Yes this was submitted to the audit committee.

MR. REIN: Mark this as Plaintiff's Exhibit number 23.

(The document referred to above was marked Plaintiff Depositions Exhibit No. 23 for identification.)

BY MR. REIN:

Q I had marked as Plaintiff's Exhibit 23 a sheet headed Joel S. Kaufman--analysis of accounts payable, suit expenses, January six, 1967.

I ask you if you can identify that.

A Yes--this is the rest of additional expenses involved in the litigation.

Q Was that submitted to the audit committee?

A Yes.

Q Mr. Kaufman, there was submitted to the board of directors on September 28, 1966 what has been introduced as Plaintiff's Exhibit 4.

Did you see a copy of that audit before it was submitted to the board of directors on September 28, 1966?

A Yes.

Q What?

A Yes.

Q Did you approve it? I mean did you approve it--did you agree that it was an accurate statement?

A Yes.

Q There has also been introduced in evidence a sheet which has been identified as Plaintiff's Exhibit 5 which has a correction which according to the understanding or the stipulation was prepared subsequent to the audit.

Do you have a copy of that in front of you?

MR. FORER: The same as Exhibit 20.

MR. FLYNN: Almost.

Off the record.

(Discussion off the record.)

BY MR. REIN:

Q Mr. Boudin has pointed out earlier when Exhibit 4 and Exhibit 5 were identified that there were certain

111 miscellaneous figures that were written on some of the sheets after the totals and after all the computations were made and he has identified those and he has indicated he did not think they were a proper part of Plaintiff's Exhibit 4.

For the purpose of my question to Mr. Kaufman I am only referring to whether the report is accurate and he saw it--and it is an accurate statement; that is expenses -- only to that portion of it, leaving out the extra figures that Mr. Boudin brought our attention to.

I think that is fairly clear.

A Yes.

Q Going to Exhibit 5, can you tell me the circumstances that led to that additional sheet being prepared after Exhibit 4 was prepared?--Exhibit 4--the whole thing.

A You wanted me to compare these two?

MR. FORER: Off the record.

(Discussion off the record.)

BY MR. REIN:

Q What caused the adjustments, and what are they? How were they brought to the attention of the audit committee? And what are the nature of the adjustments?

A One was the interest on the monies that I had borrowed from the bank on the purchase of stock.

Q That was an item that you had not previously

presented to the audit committee.

A No--they knew there was interest on this.

Q When did you present that item? Was it before or after the meeting of September 28, 1966?

THE WITNESS: Off the record.

(Discussion off the record.)

THE WITNESS: The difference, as I understand it, is the interest.

BY MR. REIN:

Q Are there any other differences as you understand it?

A (No response.)

Q You say interest on a bank loan; is that correct?

A Yes.

Q Are there any other differences?

A (No response.)

Q You have nothing other than what is on its face.

A It seems --

Q Let me ask you, Mr. Kaufman--If you can't tell me anything other than what appears on the face of the document, then there is no point of my going into it.

Let me ask you a few other questions.

On this schedule A, you have cost of legal action and you have fees and expenses to Lord,Day and Lord and Milton Levy, I think we have gone through.

Now you have an item called expenses paid directly

Joel

113 by ~~Cecil D.~~ Kaufman and Aaron P. Kaufman, Kaufman Company-- taking that up, what were the expenses paid by Joel S. Kaufman?

A Those, as I understand it, were out-of-pocket expenses--traveling and so on that is why my personal sheets from my file were taken out. These were expenses, traveling, hotels.

Q In connection with the litigation?

A In connection with the litigation.

Q Then you have expenses paid directly by Aaron P. Kaufman. What are these? Aaron P. Kaufman is your brother.

A That's my brother. They are -- I was carrying on this entire thing. My brother Aaron is a spastic; I have his power or attorney. These could have been expenses either involving Aaron or involving me that I said we will split between Aaron and myself.

Q It said paid directly by Aaron.

A Those were paid directly by Aaron P. Kaufman.

Q They were in connection --

A With the litigation.

Q Do you know the nature of the expenses?

A They would appear with some of these records. One of the cases I had to bring a lot of people up from Washington with hotel bills and everything else; it ran into considerable money.

Q That was one of the trials?

A Yes--I believe most of these expenses are in reference to either one or both of the trials.

Q You have expenses paid directly by Kaufman Company. Can you tell me -- I think you have already told me Kaufman Company is a company in which you and your brother, Aaron, are sole stockholders; is that it?

A That is correct.

Q What expenses were paid by Kaufman Company and for what?

A Expenses paid by Kaufman Company--if I was short of money or Aaron was short of money I had the Kaufman Company pay it as expense.

Q For the litigation?

A Yes, sir.

Q In the next column we have fees and costs of witnesses paid directly by -- is that Joel Kaufman?

A I think you have a sheet who paid what. And you have to Surrey & Gould -- Surrey & Gould is our attorneys here in Washington.

Q What fees did you pay them in connection with this litigation?

A I paid them a thousand dollars for some work that they did for me and I paid them twenty-eight hundred dollars which they had owed -- my brother's Estate owed to them; my brother personally owed to them.

115 Q What work did they do in connection with the Estate?

A I don't recall.

Q We have Shea & Gardner for sixteen hundred dollars. There is an asterisk next to it. Can you tell me what that represented?

A I can't tell you exactly.

Q Was it in connection with the litigation on the Estate?

A Yes.

Q Can you tell me what services they performed in connection with it?

A I can't be definite on the thing.

Q Are you indefinite?

A I will be indefinite. Mr. Shea has been my attorney for a good many years and I have come over to see him with any number of problems which I have been billed for which I have paid. One time I did come over in connection with the Estate of Robert Kaufman.

Q But you don't recall exactly what it was.

A No.

Q We have Frazier & Torbet for one thousand dollars. Who are Frazier & Torbet?

A They are auditors.

Q What services did they do in connection -- Or was it

in connection with the Estate?

A I assume so, yes.

Q You can't recall what it was.

A No.

Q We have Touche, Ross, Bailey & Smart--Who are they?

A They are auditors.

Q Was this a bill in connection with the Estate?

A We required the use of one of their men as a witness on the evaluation of the Estate prior to the Court order permitting the assets to be sold.

Q You have other costs paid directly -- M. B. Hariton & Company. You have already testified they are your auditors.

A That is correct. I also used them at one time on evaluation of assets of the Estate.

Q Do you recall when that was?--what year?

A No.

Q Was it 1959?

A It was just prior to the second trial. Mr. Bacus stayed down one night to almost one o'clock to work with me on evaluations.

Q We have Court expenses, one thousand dollars. Can you tell me what that is for?

A That is an accumulation of -- that may be the

117 nomenclature is wrong -- of expenses entailed by me after trial--of taking the attorneys to dinner or telephone calls or what-not. It's over an eight-year period and I arbitrarily put a thousand dollars.

Q You don't mean expenses paid to the Court.

A I mean expenses in addition, miscellaneous and so on.

Q Plaintiff's Exhibit number 7 which is a notice sent by Kay Jewelry Stores, Inc. to the annual meeting of stockholders of September 27, 1967 reports the following -- and let me ask you whether these figures are correct -- that you were paid by Kay Jewelry Company for the shares of stock which you sold to them which you acquired from the Estate of Robert D. Kaufman -- the sum of $397,200.29. Is that correct?

A Yes.

Q When did you receive that money?

A It's on one of those sheets of my personal records. I believe it was in December.

Q December of 1966?

A If I purchased it in June it probably was December.

Q Going on this report also states that of the total consideration paid the sum of $205,330.03 represents the price paid for the shares at the aforementioned judicial sale, and the sum of $191,870.26 represents the portion attributable to the said shares of all expenses incurred by Joel S. Kaufman

in acquiring such shares (including attorney's fees, accountant's fees, witness fees, travel and other miscellaneous expenses).

Is that a correct and accurate statement?

A Yes.

Q Your attorneys Lord, Day and Lord and Milton W. Levy petitioned the Court in probate proceedings to have their fees paid out of the Estate.

A I recall there was a petition, yes.

Q Can you tell me what happened on that petition? Were they successful or unsuccessful?

A You will see an item here of $75,000 that was paid by the Estate.

Q That was later increased to $100,000; and also your correction in number 5, if I may point it out to you -- and that was the fee they obtained from the Estate.

A I believe so.

Q Was it after this proceeding that they sent you a bill of what they thought was due to them or had you been paying them prior to that?

A This amount from the Estate, the amount of money from the Estate as I recall this was one of the reasons there was a delay in putting in the final audit because they hadn't received the money from the Estate.

Q You credited the fee which they received from the

119 Estate toward your total obligation toward them; is that correct?

A That is correct.

Q Had they billed you for it which you paid them prior to their filing this petition for the Estate -- had they sent you the bill after they had received the award from the Estate?

A They were billing me right along.

Q Had you been paying them right along?

A On and off, yes. Some years it was a little slower than other years.

Q How much had they petitioned for?

A To the best of my recollection it was $75,000 -- They had petitioned -- I am sorry, I am not a lawyer.

Q If I tell you they petitioned for $300,000, would that refresh your recollection?

A I wouldn't know what they petitioned for.

Q Did you ever see the affidavit of services filed in connection with that petition by Mr. John W. Castle, the Third, on behalf of Lord, Day and Lord, and by Mr. Milton W. Levy?

A I can't recall.

MR. REIN: Off the record.

(Discussion off the record.)

MR. REIN: Will you mark this.

(The document referred to above was marked Plaintiff Deposition Exhibit No. 24 for identification.)

MR. REIN: The parties have stipulated that the affidavits; filed by John W. Castle, the Third, on behalf of Lord, Day and Lord, and by Milton W. Levy, in support of the application of Lord, Day and Lord and Milton Levy for attorneys' fees as they appear in the Appendix of Plaintiff's Exhibit 24, through the brief filed in the matter of proving the last will and testament of Robert D. Kaufman in the New York Supreme Court -- P1403/1959 -- may be admitted as Plaintiff's Exhibit 24.

The particular pages covered by these affidavits run from 11 through 45.

MR. SHEA: Our only stipulation is that these affidavits were filed.

MR. FORER: In this proceeding.

MR. SHEA: That's all we are stipulating. Whether they be admitted or what-not is a different thing.

MR. FORER: It is marked. Those pages of Exhibit 24 for identification are true copies of the affidavits that these attorneys filed in that proceeding--that is the stipulation.

MR. SHEA: That I am prepared to stipulate.

MR. REIN: No further questions.

121 MR. SHEA: Do you have any questions?

MR. COX: I have no questions.

MR. SHEA: I have no questions.

THE NOTARY: Do you waive signature?

MR. SHEA: I think he had better read it. And then it is just a question of whether you want him to sign it.

MR. REIN: If he is going to read it.

(Whereupon, at 3:50 p.m. the taking of the deposition of JOEL S. KAUFMAN was concluded.)

- - -

I have read the foregoing pages which contain a correct transcript of answers made by me to the questions therein recorded.

______________ 1969 ______________________
JOEL S. KAUFMAN

____

Exhibit 1

MINUTES OF SPECIAL MEETING OF THE BOARD OF DIRECTORS

OF KAY JEWELRY STORES, INC. HELD ON JANUARY 25, 1966

A special meeting of the Board of Directors of Kay Jewelry Stores, Inc. was held on January 25, 1966 called pursuant to notice, a copy of which is attached hereto.

C. D. Kaufmann presided, and Simon Hirshman recorded the minutes of the meeting.

Present, Mark Freedman, B. B. Golding, Simon Hirshman, C. D. Kaufmann, D. J. Kaufmann, Joel S. Kaufmann, Bartlett Pinkham, and Melvin Rudolph, constituting a quorum of the Board.

At the direction of the President, the Secretary read the notice of the meeting.

Minutes of the Annual Meeting of the Board of Directors of Kay Jewelry Stores, Inc. held on September 22, 1965 were read and ordered adopted as such without correction.

The President reported on the fact that there were several vacancies on the Board of Directors, and after an extended discussion and upon motion duly made, seconded, and passed, Mr. Harry A. Watkins, Vice-President of Bankers Trust Company, and Dr. Reavis Cox, Professor of Marketing at the University of Pennsylvania, were elected to fill two vacancies. Whereupon, Mr. Watkins and Dr. Cox, being present in an adjoining room, were invited in and attended and participated in the meeting.

* * *

The President reported that he had had a number of inquiries from minority stockholders in subsidiary corporations, a majority of whose stock was owned by Kay Jewelry Stores, Inc., who desire to sell their minority interests.

Whereupon, on motion duly made, seconded, and passed, it was resolved that the President, C. D. Kaufmann, be and he is hereby authorized to negotiate for the purchase of such minority interests as he deems, desirable and advisable on such terms and conditions as, in his opinion, might be advantageous to this company.

* * *

There being no further business to come before the meeting, the same adjourned at 4:00 o'clock p.m.

Simon Hirshman

Secretary

Exhibit 2

MINUTES OF SPECIAL MEETING OF THE BOARD OF DIRECTORS OF KAY JEWELRY STORES, INC. HELD ON JULY 1, 1966.

A special meeting of the Board of Directors of Kay Jewelry Stores, Inc. was convened at the Savoy Plaza Hotel, 59th and Fifth Avenue, New York, N. Y. on July 1, 1966 at 10:30 a. m., called pursuant to notice mailed to each member of the Board.

Present, the following members of the Board in person: Simon Hirshman, Harry Watkins, Reavis Cox, Melvin R. Rudolph, B. B. Golding, Donald J. Kaufmann, Mark Freedman, Joel S. Kaufmann, Bartlett Pinkham, and C. D. Kaufmann. Absent: Harold Trattner.

C. D. Kaufmann presided, and Simon Hirshman recorded the minutes of the meeting.

The Secretary read the notice of the meeting, which was ordered attached to the minutes of this meeting, and the President announced the presence of a quorum.

Minutes of the special meeting of the Board of Directors of Kay Jewelry Stores, Inc. held on January 25, 1966 were read and approved, and ordered adopted as such.

* * *

It was reported that Joel S. Kaufmann, member of the Board, had recently purchased, at Public Sale ordered by the Surrogate's Court, New York County, New York in connection with the Administration of the Estate of Robert D. Kaufmann, Deceased minority interests in 39 of the company's subsidiary corporations, in which corporations, Kay Jewelry Stores, Inc. owns more than 80% of the outstanding shares in each of said subsidiary corporations, and that Joel S. Kaufmann offered to resell same to Kay Jewelry Stores, Inc. for the purchase price and the cost of acquisition. Whereupon, Joel S. Kaufmann left the room. An extended discussion ensued as to the advisability of this purchase, with a report prepared by Messrs. James S. Stoner, Attorney, Donald E. Hudson, CPA, and Jack Rihtarchik, CPA on the advisability of the purchase.

* * *

Whereupon, on motion duly made, seconded, and passed, with C. D. Kaufmann, Joel S. Kaufmann, and Donald J. Kaufmann abstaining from voting, the Board approved the purchase and the officers of the corporation were authorized and directed to purchase said shares of stock of the subsidiary corporations of Kay Jewelry Stores, Inc. from Joel S. Kaufmann at an aggregate sum not to exceed $411,000, the exact amount to be determined upon audit and to be based on the cost of said shares to Joel S. Kaufmann, including all of the costs incurred by him in acquiring said shares.

* * *

There being no further business for the attention of the meeting, the same adjourned.

Secretary

Exhibit 3

MINUTES OF ANNUAL MEETING OF THE BOARD OF DIRECTORS OF

KAY JEWELRY STORES, INC. HELD ON SEPTEMBER 28, 1966

The Annual Meeting of the Board of Directors of Kay Jewelry Stores, Inc. elected at the Annual Meeting of Stockholders of Kay Jewelry Stores, Inc. was held immediately after the adjournment of said Annual Meeting of Stockholders on September 28, 1966, at 1328 New York Avenue, N.W., Washington, D.C., in accordance with the provisions of the By-Laws of the corporation.

C. D. Kaufmann presided and Simon Hirshman recorded the minutes of the meeting.

The roll call of Directors present indicated the following present: Dr. Reavis Cox, Mark Freedman, B. D. Golding, Simon Hirshman, C. D. Kaufmann, D. J. Kaufmann, J. S. Kaufmann, Bartlett Pinkham, and Melvin R. Rudolph.

Also present: James R. Stoner, Attorney, D. E. Hudson, Controller, and J. F. Riltarchik, C.P.A.

The reading of the minutes of the last meeting was waived by unanimous vote of the Directors.

* * *

The President reported that, in accordance with the representation contained in the Proxy Statement, the Board of Directors on July 1, 1966, authorized the acquisition by the company of certain minority shares in thirty-nine (39) of the company's subsidiary corporations from Joel S. Kaufmann, Treasurer of the company, who had acquired such shares of stock at public sale ordered by the Surrogate's Court, New York County, New York, in connection with the Administration of the Estate of Robert D. Kaufmann, Deceased. The company owns more than eighty per cent of the outstanding shares in each of the said subsidiary corporations, and on February 28, 1966, the aggregate book value of the shares to be acquired by the company was $469,653.00. The Board of Directors authorized the acquisition of said shares of stock at an aggregate sum not to exceed $411,000.00, the exact amount to be determined upon audit and to be the cost of said shares to Joel S. Kaufmann, including all of the costs incurred by him in acquiring said shares. The acquisition by the company of said shares from Joel S. Kaufmann has not been completed as of this date.

Thereupon, the President called upon Donald Hudson, who presented to the Board a written report, which was handed to each member of the Board, dated September 28, 1966, signed by him, J. F. Rihtarchik, and James R. Stoner, being the special committee appointed by the Board to report on this matter, which set forth in detail the stocks involved and the costs of acquisition, which totalled $400,729.09. Whereupon, on motion duly made, seconded and unanimously passed, the Board ratified and reconfirmed its previous action authorizing this corporation to acquire said subsidiary stocks.

* * *

There being no further business for the attention of the meeting, the same adjourned at 5:30 o'clock p.m.

Secretary

Exhibit 4

R E P O R T

September 28, 1966

TO THE BOARD OF DIRECTORS, KAY JEWELRY STORES, INC.

In accordance with your instructions we have prepared the attached report relating to certain securities offered to Kay Jewelry Stores, Inc. by Joel S. Kaufmann. These securities were acquired from the Estate of Robert D. Kaufmann, Deceased, at a public auction conducted on June 6, 1966. This public auction was ordered by the Surrogate of the County of New York as a result of legal action initiated by Joel S. Kaufmann contesting the will of Robert D. Kaufmann. The offering price of such shares is Mr. Kaufmann's cost, which he has deemed to include the will contest expenses.

The securities which Mr. Kaufmann has offered to sell to Kay Jewelry Stores, Inc. are comprised of common shares of 40 subsidiary companies (the Company owns 80% or more of the stock of all classes of 39 of these corporations), preferred shares of 10 of these same subsidiary companies, common shares of 2 affiliated companies and a 6% debenture of one of these affiliated companies.

This report consists of the following schedules:

A. Cost of acquiring securities from the Estate of Robert D. Kaufmann, Deceased.

B. Allocation of cost of securities acquired from the Estate of Robert D. Kaufmann, Deceased, between Kay subsidiary and affiliated companies and other companies.

C. Securities of 40 Kay subsidiary companies and 2 affiliated companies acquired from the Estate of Robert D. Kaufmann, Deceased, Book value as of February 28, 1966, totaling $490,420.67.

D. Securities of 40 Kay subsidiary companies and 2 affiliated companies acquired from the Estate of Robert D. Kaufmann, Deceased, Earnings (Loss) year ended February 28, 1966, totaling $22,032.46.

E. Preferred Stocks of Kay subsidiary companies acquired from the Estate of Robert D. Kaufmann, Deceased.

Several adjustments may yet be made to the costs of acquiring the securities from the Estate. Mr. Joel S. Kaufmann has filed an appeal contending that the $75,000 fee decreed to be paid by the Estate is not adequate. In the event that this appeal is successful the net cost to Joel S. Kaufmann will be reduced by the additional amount allowed by the court. It is our understanding that Kay's purchase price will be reduced by 68.6% of this additional amount allowed by the court.

A final agreement as to the amount of Milton Levy's fee has not been reached, but Joel S. Kaufmann has a verbal agreement that the fee will be $75,000. He has proposed that any adjustments in the final billing from Milton Levy, or other legal bills be reflected proportionately in the purchase price of the Kay stock.

Respectfully Submitted,

D. E. Hudson

J. F. Rihtarchik

J. R. Stoner

Schedule A

Joel S. Kaufmann

Cost of Acquiring Securities from Estate of Robert D. Kaufmann, Deceased

Costs of Lord Hathaway?	
Lord, Day & Lord - Fees & expenses	$ 269006.72
Milton Levy - fee	75000.00 *
Expenses paid directly by:	
Joel S. Kaufmann	2071.45
Aaron C. Kaufmann	1366.76
Kaufmann Company	1982.77
Fees and Costs of Witnesses paid directly by Mr. Kaufmann	
Gurney & Smith	3700.00
[illegible] & Fortier	16000.00 *
Fraser & Torbet	1000.00
Touche, Ross, Bailey & Smart	2000.00
Other costs paid directly	
M.B. Hunter & Co.	1000.00
Court expenses	1000.00 *
	$ 357836.28
Less: Portion of fee to be paid by Estate	75000.00
	$ [illegible]
Auction price paid for stock	[illegible]93903
Total Cost of Purchasing All Securities from Estate of Robert D. Kaufmann, Deceased	$ [illegible]31
	284833.28
−	25000
	259833.28
	349
+	965975
	269811

* Amounts not accrued

Schedule B

Joel S. Kaufmann

Allocation of Cost of Securities Acquired from the Estate of Robert P. Kaufmann, Deceased, between Key Subsidiary and Affiliated Companies and Other Companies

	Key Subsidiary and Affiliated Companies	Other Companies	Total
Total Purchase Price	205330.03	94057.00	299387.03
Ratio of purchase price	68.6 %	31.4 %	100.0 %
Allocation of costs (based upon above ratio)	195399.02	89439.22	284837.26
Total Cost of Securities of Key Subsidiary and Affiliated Companies	400729.09		
	269 185115	<- - - -	269847
	205330 390445		
	410420.67 400729.09 11691.58		

Exhibit 5

Kay Jewelry Stores Inc

Payment to Joel S Kaufmann for stocks of [illegible] Company purchased from Estate of [illegible] Kaufmann

	Per Original Report	Adjustment	Final Amount
Lord, Day & Lord			
Fees	240000.00	20000.00	260000.00
Expenses	29006.92	618.96	29625.88
Fees paid by Estate	(175000.00)	(25000.00)	(100000.00)
Interest on loan from [illegible] bank		9657.75	9657.75
Levy fee	75000.00		75000.00
All other expenses	15831.34		15831.34
Totals	284838.26	5227.71	290116.79

Allocation:	Kay	[illegible]	Total
Based on total purchase price of stocks (68.6% to Kay)	181879.26	83241.73	265116.79
Based on JS Kaufmann estimate	100000.00	150000.00	250000.00 (A)
Total Expenses	191879.26	98241.73	290116.79
Cost of stocks	205330.03		
	397209.29		
Paid to Joel S Kaufmann	390630.29		
Due to Joel S Kaufmann	6579.00		

Legal Expenses	111[illegible]
Cost of stock	205,330[illegible]
Total paid to Joel [illegible] Kaufmann	[illegible]

Exhibit 6

KAY JEWELRY STORES, INC.

1320 New York Ave., N.W.

Washington, D. C.

Notice of Annual Meeting of Stockholders

September 28, 1966

* * *

On July 1, 1966, the Board of Directors of the Company authorized the acquisition of the Company of certain minority shares in 39 of the Company's subsidiary corporations from Joel S. Kaufmann who had acquired such shares of stock at public sale ordered by the Surrogate's Court, New York County, New York, in connection with the Administration of the Estate of Robert D. Kaufmann, Deceased. The Company owns more than eighty (80%) per cent of the outstanding shares in each of the said subsidiary corporations and on February 28, 1966, the aggregate book value of the shares to be acquired by the Company was $469,653. The Board of Directors authorized the acquisition of said shares of stock at an aggregate sum not to exceed $411,000., the exact amount to be determined upon audit and to be the cost of said shares to Joel S. Kaufmann, including all of the costs incurred by him in acquiring said shares. The acquisition by the Company of said shares from Joel S. Kaufmann has not been completed as of this date.

* * *

Exhibit 8

At a Surrogate's Court of the State of New York, held in and for the County of New York, at the Hall of Records, Borough of Manhattan, City of New York, on the 29th day of April, 1966.

P R E S E N T:

HON. JOSEPH A. COX,

Surrogate.

Filed
April 29, 1966
Surrogate's Court
New York County

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In the Matter of the Application of ARTHUR W. GRAEF as Temporary Administrator of the goods, chattels and credits of

ROBERT D. KAUFMANN,

Deceased,

to sell at public auction securities owned by the said decedent.

: P 1403/1959

: ORDER ON APPLICATION OF TEMPORARY ADMINISTRATOR FOR AUTHORIZATION TO SELL SECURITIES, ETC.

-----------------------------------x

On reading and filing the petition of Arthur W. Graef, as Temporary Administrator, verified May 13, 1965, for an order authorizing the sale of the securities owned by Robert D. Kaufmann, the decedent above named, set forth in Exhibit "A" attached to the said petition, at public auction by this Court on a date and upon such terms and conditions as may be required by this Court at a total price not less than the appraised value of $249,919.00; that the petitioner be directed to transfer and deliver said securities to the purchaser thereof upon payment of the purchase price; that out of the proceeds of the sale of said securities, the Temporary Administrator be authorized to pay all costs and expenses necessary to effect such a sale, and for such other

and further relief as the Court may deem to be in the best interests of the Estate;

And upon reading and filing the order to show cause of the Hon. S. Samuel DiFalco, Surrogate, dated May 13, 1965 with proof of service thereof requiring Walter A. Weiss, Joel S. Kaufmann, Aron P. Kaufmann, Richard D. Kaufmann and Lee S. Kaufmann to appear on May 25, 1965 why an order should not be made authorizing the relief requested as aforesaid by the said Temporary Administrator, and on reading and filing the affidavit of Leonard S. Leaman, sworn to May 24, 1965, joining in the prayer of said petition of Arthur W. Graef, the said Temporary Administrator, to sell the securities set forth in the said petition, and upon reading and filing the answer of the respondent, Walter A. Weiss verified May 25, 1965 appearing pro se; and Joel S. Kaufmann, Aron P. Kaufmann, Richard D. Kaufmann and Lee S. Kaufmann having appeared by Lord, Day & Lord, their attorneys, as appears from the authorized notice of appearances filed on May 26, 1965, and the said matter having come on before me to be heard on August 20, 23, 24, September 28, 30, October 1 and 4, 1965, and January 26, 27 and 28, 1966, and the petitioner Arthur W. Graef, having appeared pro se, and the said Joel S. Kaufmann, Aron P. Kaufmann, Richard D. Kaufmann and Lee S. Kaufmann, having appeared by Lord, Day & Lord, their attorneys, Leonard S. Leaman, of counsel, and consenting to the granting of the prayer for relief of the said Arthur W. Graef, Temporary

Administrator, and the said Walter A. Weiss having appeared by Mullane & Moukad, his attorneys, Kenneth J. Mullane, of counsel, and after hearing the proofs of the parties, after due deliberation, and on filing the decision of the Court on April 19, 1966, it is

ORDERED, that Arthur W. Graef, as Temporary Administrator, be and he hereby is authorized and directed to sell to the highest bidder at a public auction to be conducted before and by this Court, the following securities owned by Robert D. Kaufmann, the above-named decedent, at a sales price which shall not be less than an aggregate of $106,915:

431 Shares	Kaufmann Furniture Company Merged into Kaufmann Company in 1960 and now represented by 201.625 shares of the Kaufmann Company
120 Shares	Kaufmann Company
20 Shares	Homer Optical Company
25 Shares	Swope Realty Company
35 Shares	143 Main Street East, Inc.
128 Shares	Fairfax Importers, Inc.
19 Shares Preferred	Kay Jewelry Company, Inc. Buffalo, New York
8 Shares Preferred	Kay Jewelry Company, Inc. Charlotte, N. C.
12 Shares Preferred	Kay Jewelry Company, Inc. Lancaster, Pa.
13 Shares Preferred	Kay Jewelry Company, Inc. Lawrence, Mass.
1.5 Shares Preferred	Kay Jewelry Company, Inc. Louisville, Ky.

12 Shares Preferred	Kay Jewelry Company, Inc. Nashville, Tenn.
9 Shares Preferred	Kay Jewelry Company, Inc. New Bedford, Mass.
20 Shares Preferred	Kay Jewelry Company, Inc. Norwich, Conn.
17 Shares Preferred	Kay Jewelry Company, Inc. Salem, Mass.
33 Shares Preferred	Kay Jewelry Company, Inc. Winston-Salem, N. C.
31 Shares Preferred	143 Main Street East, Inc.
$500 Debenture	Kay Utica Company, Inc. Utica, New York

; and it is further

ORDERED, that the said Temporary Administrator be and he hereby is authorized and directed to sell to the highest bidder at a public auction to be conducted before and by this Court, the following securities owned by Robert D. Kaufmann, the above-named decedent, at a sales price which shall not be less than 30% of their book value which is an aggregate amount of $85,516.81:

500 Shares	Kay Jewelry Company, Inc. Birmingham, Ala.
20.8 Shares	Kay Jewelry Company, Inc. Buffalo, New York
23 Shares	Kay Jewelry Company, Inc. Charlotte, N. C.
25 Shares	Kay Jewelry Company, Inc. Evansville, Ind.
20 Shares	Kay Jewelry Company, Inc. Greensboro, N. C.
70 Shares	Kay Jewelry Company, Inc. Hagerstown, Md.

108 Shares	Kay Jewelry Company, Inc. Hartford, Conn.
16 Shares	Kay Jewelry Company, Inc. Indianapolis, Md.
6 Shares	Kay Jewelry Company, Inc. Lancaster, Pa.
65 Shares	Kay Jewelry Company, Inc. Lawrence, Mass.
60 Shares	Kay Jewelry Company, Inc. Malden, Mass.
45 Shares	Kay Jewelry Company, Inc. New Britain, Conn.
804 Shares	Kay Jewelry Company, Inc. Norwich, Conn.
20 Shares	Kay Jewelry Company, Inc. Peoria, Ill.
4 Shares	Kay Jewelry Company, Inc. Quincy, Mass.
500 Shares	Kay Jewelry Company, Inc. Rochester, New York
7 Shares	Kay Jewelry Company, Inc. Salem, Mass.
350 Shares	Kay Jewelry Company, Inc. Springfield, Ill.
6 Shares	Kay Jewelry Company, Inc. Springfield, Mass.
3 Shares	Kay Jewelry Company, Inc. Toledo, Ohio
400 Shares	Kay-Utica Company, Inc. Utica, New York
17 Shares	Kay Jewelry Company, Inc. Woonsocket, R. I.
120 Shares	Kay Jewelry Company, Inc. Worcester, Mass.
20 Shares	Kay Jewelry Company, Inc. York, Pa.

42 Shares	Whitman Jewelry Company Reading, Pa.
80 Shares	Leeds Jewelry Company, Inc. Washington, D.C.
7 Shares	Marx Jewelry Company Washington, D.C.
75 Shares	Swope Jewelry Company, Inc.
220 Shares	Franc Jewelry Company 14th Street Washington, D.C.
18 Shares	Hadley Company Springfield, Mass.

; and it is further

ORDERED, that the said Temporary Administrator be and he hereby is authorized and directed to sell to the highest bidder at a public auction to be conducted before and by this Court, the following securities owned by Robert D. Kaufmann, the above-named decedent, at a price not less than the value of the said securities, computed on a 12 times annual earnings basis, discounted by 16-2/3%, which is an aggregate amount of $106,956.22:

16 Shares	Kay Jewelry Company, Inc. Allentown, Pa.
55.1 Shares	Kay Jewelry Company, Inc. Atlanta, Ga.
15 Shares	Kay Jewelry Company, Inc. Charleston, West Virginia
125 Shares	Kay Jewelry Company, Inc. Chattanooga, Tenn.
7 Shares	Kay Jewelry Company, Inc. Huntington, West Virginia
200 Shares	Kay Jewelry Company, Inc. Knoxville, Tenn.

17 Shares	Kay Jewelry Company, Inc. Louisville, Ky.
13 Shares	Kay Jewelry Company, Inc. Lynn, Mass.
29 Shares	Kay Jewelry Company, Inc. Nashville, Tenn.
70 Shares	Kay Jewelry Company, Inc. New Bedford, Mass.
425 Shares	Kay Jewelry Company, Inc. Winston-Salem, N. C.
11 Shares	Franc Jewelry Company, Inc. Arlington, Va.
7 Shares	Whalen Jewelry Company Worcester, Mass.

; and it is further

ORDERED, that all of the securities hereinabove set forth be sold at a public auction to be held before and conducted by Hon. Joseph A. Cox, Surrogate of the County of New York, in the Surrogate's Court, Room 509, Hall of Records, 31 Chambers Street, New York, New York at 10:00 AM on the 6^{th} day of June, 1966; and it is further

ORDERED, that [redacted] before the 6^{th} day of June 1966 notice of sale in the form annexed hereto and marked Exhibit A shall be published by Arthur W. Graef, the Temporary Administrator, once a week for four successive weeks in the Wall Street Journal and the New York Times, or if, because of circumstances beyond the control of the petitioner publication cannot be made or completed in the New York Times, publication may be made or completed in the New York Post; and it is further

ORDERED, that the Terms of Sale upon which the securities hereinabove set forth will be sold shall be those specified in Exhibit B annexed to this order ~~the above mentioned notice of sale annexed hereto and marked Exhibit A;~~ and it is further

ORDERED, that all expenses incident to the sale, including the notice of publication referred to above, shall be paid out of the proceeds of the sale of the said securities.

Joseph A. Cox
~~Surrogate~~
Surrogate

Exhibit 9

[Caption Omitted in Printing]

File No.
P 1403/1959

REPORT OF SALE

TO THE SURROGATE'S COURT OF THE COUNTY OF NEW YORK:

The undersigned, David J. Levy, a member of the Bar, associated in this matter with ARTHUR W. GRAEF, Temporary Administrator of the above-entitled estate, do report for and on behalf of the said Temporary Administrator as follows:

1. This court entered its Order of Sale herein, dated April 29, 1966 and thereafter duly entered, pursuant to which the said Arthur W. Graef, as Temporary Administrator, was authorized and directed to sell to the highest

bidder, at a public auction to be conducted in and by this court, three groups of securities, being a "First Parcel", upon which the said order fixed an upset price of $106,915; a "Second Parcel", upon which the said order fixed an upset price of $85,516.81; and a "Third Parcel", upon which the said order fixed an upset price of $106,956.22; and upon which said three parcels the said order fixed an aggregate upset price of $299,388.03; and pursuant to which Order and appended Notice and Terms of Sale certain further directions were prescribed, as hereinafter more fully set forth.

2. The said Order of Sale directed that before the 6th day of June, 1966 a Notice of Sale in the form thereto annexed and marked Exhibit A should be published by the Temporary Administrator once a week for four successive weeks in The Wall Street Journal and The New York Times. This direction was complied with, such publication having been effected in the said Wall Street Journal on May 9, 16 and 23 and June 1, 1966, and in the said New York Times on May 9, 16, 23 and 30, 1966 as per affidavits of publication hereto attached, marked Exhibits A and B.

3. The Notice of Sale appended as Exhibit A to said order provided that a copy of the Terms of Sale, together with financial and other information on the securities comprising the subject matter of the three parcels, be available for inspection at the office of Arthur W. Graef, Temporary Administrator, at 1 East 43rd Street, New York City, on weekdays between the 31st day of May, 1966 and the

3rd day of June, 1966, between 2:00 o'clock and 5:00 o'clock in the afternoon. This direction was complied with in all respects, all financial statements and other information in the possession or control of the Temporary Administrator having been made available on the said dates, and at the stipulated times and places, to all persons making request or inquiry therefor.

4. The matter thereafter duly came on before this court on the 6th day of June, 1966, at 10:00 o'clock A.M. Thereupon, the undersigned represented to this court that the Appellate Division, First Department, entered its Order herein on May 24, 1966, granting the application of Walter A. Weiss and staying the sale herein, upon condition that a bond of $100,000 be posted within 10 days; that said Order had been served upon the said Walter A. Weiss on May 25, 1966; that the stated period of 10 days expired on June 3, 1966, which fell on a Saturday, and that the time for the posting of bond would therefore not close until the end of that day, i.e., Monday, June 6, 1966; and for these reasons the undersigned asked that the sale be adjourned for one day. This court thereupon rescheduled the sale for the following day, June 7, 1966, at 10:00 A.M. before the court.

5. Thereupon and on said date the matter was again called, and following disposition of applications for postponement the court proceeded with the sale pursuant to the terms of the order, offering the three parcels for sale to the highest bidder, and sold the same to Joel S.

Kaufmann, who bid the upset and highest price, namely $106,915 for the First Parcel, $85,516.81 for the Second Parcel, $106,956.22 for the Third Parcel, and $299,388.03 as the aggregate for all three parcels.

6. The said purchaser, Joel S. Kaufmann, thereupon and in accordance with the Terms of Sale executed and delivered to the Temporary Administrator appropriate Memorandum of Sale, and paid therewith the sum of $30,000 by bank check and the further sum of $30,000 by his individual check, the said sums aggregating $60,000 and being in excess of 20% of the amount bid, of which at least 50% was by certified check, and the receipt of the Temporary Administrator was given to the purchaser.

7. Thereupon and on June 9, 1966 the remainder of the purchase price was paid by the purchaser to the Temporary Administrator, by certified check in the sum of $239,388.03, and the Temporary Administrator thereupon delivered and transferred to the purchaser the securities comprising the property sold, with all necessary transfer stamps affixed and cancelled.

8. That the purchase money was thereupon deposited, $60,000 thereof on June 7, 1966 and the balance of $239,388.03 on June 9, 1966 in a bank account entitled "Estate of Robert D. Kaufmann, Deceased, Arthur W. Graef, Temporary Administrator" and maintained by the latter in the Irving Trust Company, 46th Street and Madison Avenue in the Borough of Manhattan, New York City.

9. That the reason this report is made by the undersigned and not by the Temporary Administrator personally is that the latter is out of the country, not expected to return for some weeks; that the undersigned has full knowledge of all of the matters and things pertinent hereto or hereinabove set forth; and that it is desirable that this report be made to the parties and to the court with all convenient speed.

10. The entry of an Order of confirmation of the sale, although perhaps not strictly required by law, is respectfully prayed for.

Dated, New York, N. Y. June 13, 1966.

s/ David J. Levy
DAVID J. LEVY

Exhibit 10

[Caption Omitted in Printing]

File No.
P 1403/1959

ORDER CONFIRMING SALE

Upon the Report of ARTHUR W. GRAEF, Temporary Administrator of the within Estate, made in his behalf and dated and verified by David J. Levy on the 13th day of June, 1966, together with due proof of service thereof and of notice of settlement upon all parties entitled to such notice, and upon the Order of Sale made in these proceedings, dated the 29th day of April, 1966, and thereafter

duly entered, and it appearing to the court that the same has been effected and consummated by the said ARTHUR W. GRAEF, as Temporary Administrator herein, in all respects in accordance with the aforesaid Order of this court, dated April 27, 1966, and the court having deliberated upon the matters and things herein set forth, it is

ORDERED AND ADJUDGED that the said Report of Sale by and on behalf of said ARTHUR W. GRAEF, as Temporary Administrator of the Estate of Robert D. Kaufmann, Deceased, and all the matters and things done and effected as therein set forth, be and the same hereby are in all respects ratified and confirmed, and the sale made as therein described shall be absolute and binding.

/s/ Joseph A. Cox.
Surrogate.

Exhibit 11

August 15, 1966

MEMORANDUM TO: MR. JACK RIHTARCHIK

From: Joel S. Kaufmann

WILL CONTEST EXPENSES

According to the information I have been able to gather on the will contest, following I think is the information you will require.

	$145,000.00	First will contest and appeal
	35,000.00	Second will contest
	10,000.00	Appeal
	13,000.00?	Approximate amount (will have to check first) First trial-out of pocket expenses
	2,800.00	Surrey & Gould (witnesses)
	6,405.21	Expenses for Weiss's removal as temporary administrator
	1,000.00	Surrey & Gould (services)
	1,600.00	Shea & Gartner (services)
	1,746.38	Kaufmann Company(travel)
1366.96	~~[illegible]~~ ~~38.66~~	Expenses(Aron P. Kaufmann)
2081.63	~~4,581.63~~	Expenses(Joel S. Kaufmann)
	1,000.00	Court Expenses(Joel S. Kaufmann)
	1,000.00	Court Auditor
	10,000.00	Milton Levy (on account) Lord, Day & Lord
	3,809.81	Out of pocket expenses. (~~Joel S. Kaufmann~~)
	65,000.00	Amount still owed Milton Levy for two trials
	Unknown	Services in proceedings, collateral to the will contest including surcharge proceedings.

$301,981.69	Total

Joel S. Kaufmann

JSK/sa

* * *

Exhibit 20

Key Jewelry Stores Inc

Payment to Joel S Kaufmann for Stocks of Subsidiary Companies Purchased from Estate of R.C.L. Kaufmann

	Per Original Report	Adjustment	Final Amount
Lord Day & Lord			
Fees	240000.00	20000.00	260000.00
Expenses	29006.92	618.96	29625.88
Fees paid by Estate	(75000.00)	(25000.00)	(100000.00)
Interest on loan from Riggs bank		9659.75	9659.75
Levy fee	75000.00		75000.00
All other expenses	15831.36		15831.36
Totals	284838.28	5278.71	290116.99
Allocation:	Key	Other Stocks	Total
Based on total purchase price of stocks (68.6% to Key)	181870.26	83246.73	265116.99
Based on JS Kaufmann estimate	10000.00	15000.00	25000.00
Total Expenses	191870.26	98246.73	290116.99
Cost of stocks	205330.03		
	397200.29		
Paid to Joel S Kaufmann	390630.29		
Due to Joel S Kaufmann	6570.00		

Exhibit A to Plaintiff's Request for Admission of Genuineness of Documents

SURROGATE'S COURT : COUNTY OF NEW YORK

- -

In the Matter of the Application of ARTHUR W. GRAEF as Temporary Administrator of the goods, chattels and credits of

ROBERT D. KAUFMANN, Deceased

to sell at public auction securities owned by the said decedent

- -

Index No. P1403/1959

PETITION

The petition of Arthur W. Graef respectfully shows:

1. That petitioner is the Temporary Administrator of the goods, chattels and credits of Robert D. Kaufmann, deceased, late of the County of New York, having been duly appointed by an order of this Court dated October 5, 1964 and that he has duly qualified and is acting as such Temporary Administrator.

2. That there was delivered to petitioner by Walter A. Weiss, petitioner's predecessor, the securities listed in Schedule A attached hereto which represent a minority interest in the common stock of fifty five different corporations as well as a minority interest in the preferred stock of eleven different corporations and one $500. debenture bond all of which securities were owned by the decedent at the date of his death on April 19, 1959.

3. That pursuant to an order of this Court dated March 17, 1965 the firm of Fraser & Torlet appraised the aforesaid securities which appraisal is attached hereto and marked Exhibit A.

4. That included in Schedule A hereto annexed are valuations of the minority interest in the common stock owned by decedent in the following five corporations:

No. of shares	Description	Appraised Value
165	Key Jewelry Co. Jacksonville, Fla.	$[illegible],653.00
30.1	Key Jewelry Co. Washington, D.C.	13,658.00
6	Franc Jewelry Company, 7th St., Washington, D.C.	2,970.00
6	The Ross Company, Washington, D.C.	1,530.00
16.3	Franc Alexandria Co. Inc., Alexandria, Va.	$6,[illegible].00
		$3[illegible],704.00

That the above described stocks form no part of this proceeding and are to be disregarded as they are the subject matter of another proceeding in this Court.

5. That the total appraised value of the common stock of the remaining fifty corporations, the preferred stock in eleven corporations and the $500 debenture bond as set forth in Schedule A amounts to $[illegible]49,919.

6. That there is pending before this Court in another proceeding an application by Messrs. Lord, Day & Lord for attorneys' fees in the sum of $300,000., an application by Milton Pollack, Esq. for attorney's fees in the sum of $100,000., an application by Leon Herzfeld for additional fees as Special Guardian in the sum of $15,000.; that pursuant to an order of remittitur of this Court dated April 1, 1965 there was awarded to Messrs. Lord Day & Lord the sum of $3,337.; that an application will ultimately be

made by petitioner for commissions and legal services. That there is also pending an additional assessment by the United States of America of approximately $407,000 for estate taxes.

7. That in the opinion of petitioner this Court can not fix the fees applied for as above set forth until the assets of the decedent's estate have been liquidated.

8. That the securities referred to in Exhibit A annexed hereto have not a ready market and are not of the nature a fiduciary should continue to hold.

9. That petitioner has on hand cash in the sum of $4,5[illegible].73.

10. That it is petitioner's considered opinion that the securities described in Exhibit A attached hereto be sold at public auction by this court at the time and upon the terms and conditions of sale as may be required by this Court. It is respectfully suggested that one of the terms of sale requires that the total bid price be not less than $[illegible]49,[illegible].

11. That the names and post office addresses of all persons interested in this proceeding who are required to receive notice of this application or concerning whom the Court is required to have information are:

Walter A. Weiss, Esq.	200 E. 63rd St., New York, N.Y.
Joel S. Kaufmann	4545 Connecticut Avenue Washington, D. C.
Aron P. Kaufmann	1 University Place New York, N.Y.
Richard D. Kaufmann	4545 Connecticut Avenue Washington, D. C.
Leo S. Kaufmann	4545 Connecticut Avenue Washington, D.C.

12. That there are no other persons than those mentioned interested in this application or proceeding and that all the above named persons are of full age and sound mind.

13. That no previous application has been made for the relief sought in this proceeding.

WHEREFORE your petitioner prays this Court, that the following securities of the decedent above named be sold by this Court at public auction on the date and upon the terms and conditions as may be required by this Court, at a total price of not less than $249,919.

Shares of Common Stocks	Company
16	Key Jewelry Company of Pennsylvania Allentown, Pa.
55.1	Key Jewelry Co. Atlanta, Ga.
500	Key Jewelry Co. of Birmingham, Ala.
30.8	Key Jewelry Company, Inc. Buffalo, N.Y.
12	Key Jewelry Company of Charleston
23	Key Jewelry Company of Charlotte, North Carolina
125	Key Jewelry Co. of Chattanooga, Inc.
25	Key Jewelry Company, Inc. Evansville, Ind.
20	Key Jewelry Company of Greensboro, Incorporated Greensboro, N.C.
7	The Key Jewelry Company of Hagerstown, Inc. Hagerstown, Md.
100	The Key Jewelry Company Hartford, Conn.
7	Key Jewelry Company, Huntington, W.Va.
16	Key Jewelry Company, Indianapolis, Ind.
100	Key Jewelry Company of Knoxville, Tenn.
6	Key Jewelry Company of Lancaster, Lancaster, Pa.
65	Key Jewelry Company of Lawrence, Lawrence, Mass.
17	Key Jewelry Company, Louisville, Ky
10	Key Jewelry Company of Lynn, Mass.
60	Key Jewelry Company of Malden, Mass.
29	Key Jewelry Company, Nashville, Tenn.
70	Key Jewelry Company of New Bedford, Mass.

45	The Kay Jewelry Company of New Britain, Inc. New Britain, Conn.
804	The Kay Jewelry Co. of Norwich, Inc. Norwich, Conn.
20	Kay Jewelry Company, Peoria, Ill.
4	Kay Jewelry Company of Quincy, Mass.
500	Kay's Jewelry Rochester Corp. Rochester, N.Y.
7	Kay Jewelry Company of Salem, Salem, Mass.
350	Kay Springfield Corporation, Springfield, Ill.
6	The Kay Jewelry Company, Springfield, Mass.
3	The Kay Jewelry Company of Toledo, Inc., Toledo, Ohio
400	Kay-Utica Company, Inc. Utica, N.Y.
425	Kay Jewelry Co. of Winston-Salem, Inc., Winston-Salem, N.C.
17	Kay Jewelry Co. of Woonsocket, Inc., Woonsocket, R.I.
120	The Kay Jewelry Company, Worcester, Mass.
20	Kay Jewelry Company, York, Pa.
11	Franc Jewelry Company of Virginia. Incorporated Arlington, Va.
42	Wittman Jewelry Company, Reading, Pa.
80	Leeds Jewelry Co., Inc., Washington, D.C.
7	Marx Jewelry Company, Washington, D.C.
75	The Swope Jewelry Company, Inc. Washington, D.C.
7	Whelan Jewelry Company, Worcester, Mass.
10.3	Franc Jewelry Co. of N.E., Inc., Washington, D.C.
220	Franc Jewelry Co. of Fourteenth St. Inc., Washington, D.C.
18	Hadley Company, Springfield, Mass.
431	Kaufmann Furniture Co. Reading, Pa.
170	Kaufmann Company, Reading. Pa.
20	Homer Optical Co., Washington, D.C.
65	Swope Realty Company, Washington, D.C.
35	143 Main Street East, Inc., Rochester, N.Y.
140	Fairfax Importers, Inc., Washington, D.C.

Shares of Preferred Stocks	Company
19	Kay Jewelry Company, Inc., Buffalo, N.Y.
8	Kay Jewelry Company of Charlotte, North Carolina
12	Kay Jewelry Company of Lancaster, Pa.
13	Kay Jewelry Company of Lawrence, Mass.
1.5	Kay Jewelry Company, Louisville, Ky.
12	Kay Jewelry Company, Nashville, Tenn.
9	Kay Jewelry Company of New Bedford, Mass.
20	The Kay Jewelry Co. of Norwich, Inc., Norwich, Conn.
17	Kay Jewelry Company of Salem, Salem, Mass.
33	Kay Jewelry Co. of Winston-Salem, Inc., Winston-Salem, N.C.
31	143 Main Street East, Inc., Rochester, N.Y.

Bond	
$500	Kay-Utica Company, Inc., 6% debenture (Utica, N.Y.)

That petitioner be directed to transfer and deliver said securities to the purchaser thereof upon payment of the purchase price.

That out of the proceeds of sale he be authorized to pay all costs and expenses including federal and state transfer stamps necessary to effectuate said transfer.

And for such other and further relief as the Court may deem to be for the best interests of the estate.

Arthur W.Graef, petitioner

EXHIBIT B

TO PLAINTIFF'S REQUEST FOR ADMISSION OF GENUINENESS OF DOCUMENTS

NEW YORK LAW JOURNAL — Wednesday, April 20, 1966

By Mr. Surrogate Cox.

ESTATE OF ROBERT D. KAUFMANN (2 proceedings)—The temporary administrator, who succeeded to that office upon the removal of his predecessor, instituted two proceedings: the first proceeding, to permit him to accept an offer for the exchange of corporate shares made by a parent corporation to shareholders of subsidiary corporations and the second proceeding, to authorize the sale of other corporate shares at a public auction. The history of this estate is one of continuous litigation. A jury found a purported will of the decedent to be invalid but a decree denying probate was reversed and a new trial was directed (Matter of Kaufmann, 14 A. D. 2d 411). A second jury reached the same conclusion and the decree accepting this verdict was affirmed (Matter of Kaufmann, 20 A. D. 2d 464, aff'd 15 N. Y. 2d 335). An application to revoke letters of temporary administration, which had been granted to the proponent of the instrument propounded as a will, required lengthy hearings and resulted in a decree removing the temporary administrator. A number of issues either incidental to the proceeding or arising in the course of the estate's administration also have been litigated with the consequence that expenses have been incurred and substantial demands for attorneys' have been asserted. These claims, coupled with tax claims, those of creditors and the unavoidable charges of administration, make it essential that the estate assets be converted to a liquid form, a result which can be accomplished only if the corporate shares with which the instance two proceedings are concerned be converted to cash. At his death the decedent owned 165 shares of Kay Jewelry Co. of Jacksonville, 30.1 shares of Kay Jewelry Co. of Washington, 6 shares of Franc Jewelry Co. of Washington, 6 shares of R[illegible] Co. of Washington and 18.3 shares of Franc Alexandria Co., Inc. These companies were subsidiaries of Kay Jewelry Stores, Inc. and on September 23, 1963, the latter corporation offered to exchange an aggregate of 3,517.16 shares of its capital stock for the stated interests of the estate. The former temporary administrator declined this offer and initiated three appraisal actions in the District of Columbia with respect to the Washington companies. The present temporary administrator seeks to discontinue these actions and to accept the exchange offer. The evidence at the hearings disclosed that the former temporary administrator lacked a sound basis for the institution of these actions in that he was not possessed of information sufficient to justify a conclusion that the actions could be beneficial to the estate. Much testimony has been taken as to the value of the shares involved in these actions and the value of shares of other subsidiaries with regard to which appraisal actions were not instituted. This testimony and the opinions of experts were based upon information garnered after the exchange offer had been rejected and after the appraisal actions had begun. Not only were the witnesses in complete disagreement as to value but the disparities in their thinking are so great as to be wholly irreconcilable. The stock of the parent company is traded on the American Stock Exchange and since the exchange offer the shares of this company have substantially appreciated on the open market. The court is convinced that it will be to the advantage of the estate to discontinue the pending actions and to effect the exchange of stock. The temporary administrator will be authorized to do this and to sell the securities so procured on the American Stock Exchange. As to other holdings of the estate the appraisers were in agreement that certain of these assets, including some preferred stock and a bond, had a total value of $106,915. With regard to other minority interests in corporations the appraisers were at opposite poles. The testimony offered by the petitioner and certain respondents was that the total value of these assets was $143,004. The testimony presented by the former temporary administrator was that the same assets had a value of $413,593.40. The "experts" were in agreement only to the extent that a book value basis was appropriate in evaluating the shares of some companies and a price earnings basis was applicable to the evaluating of shares of other companies. They agreed that the basic figure for employing the book value method was $285,055.94 but at this point they took their separate ways. The former temporary administrator assumes the position that the holdings evaluated on a book value basis should be appraised at least at full book value while the opposing position is that such value should be severely de~~[illegible]~~ by reasons of the fact that these securities as minority interests in the corporations were not readily marketable. This factor cannot be ignored and it is apparent that a realistic approach to the question of valuation must recognize that, absent unusual circumstances. The shares of the present corporation, which are traded on the American Stock Exchange, have been selling for 40 per cent of book value. The holdings of this estate do not have this market and cannot conceivably be evaluated higher than the parent on a book value basis. The appraisers employed by the petitioner imposed two discounts to reflect both the minority interests and the lack of an open market and suggest a valuation of 22½ per cent of book value. Inasmuch as the immediate question is not one of actual valuation but only one of fixing the minimum price at which the securities are to be offered for sale, a discount of 70 per cent of book value seems appropriate for this purpose. In respect of the shares valued on an earnings basis, the conflict in appraisals is occasioned in the first instance by the fact that one appraisal has been made on the basis of earnings in a single year while the other appraisal is based on earnings over a period of years. One valuation arrived at is $128,347.46 while another is $72,899. In support of the higher figure, contended for by the former temporary administrator, claims are made respecting improper accounting methods employed by the parent company and undue advantages taken by the parent company. There are other contentions regarding the financial arrangements between the parent company and its subsidiaries. All of these claims and contentions contribute nothing to the present value of the corporate shares which must be based upon the existing financial condition and the potential earnings of the respective companies. The assertion of these arguments would be relevant only in a stockholder's action and they are wholly foreign to the existing issue concerned with a possible sales price of the shares today. The lower figure is arrived at by discounting the initial earnings basis by 16 2/3 per cent for lack of marketability and the imposition of a further discount of 25 per cent because the shares constitute minority interests. The net result is that the initial "12 times" ratio is pared to a "7.5 times" ratio. The differences in the appraisals on a price earnings method did not have the same approach and cannot be reconciled. One is as arbitrary as the other and the court is left with no alternative but to assume a position which can be characterized as equally arbitrary. The discount of 16 2/3 per cent appears to give adequate consideration to the circumstances that the shares are not readily marketable and represent minority interests, particularly since the latter fact is a major element affecting the shares marketability. It is directed that an effort be made to accomplish a public sale on this upset basis. In opposing any attempt to liquidate the shares held by the estate the former temporary administrator relies upon Matter of Bernstein (13 App. Div. 2d 743) and the observations in that opinion to the effect that a court should not assume the responsibility of executors (citing Matter of Bourne, 9 App. Div. 2d 647; 11 App. Div. 2d 128, aff'd 8 N. Y. 2d 1041) and, in any event, should lend its approval to an executor's proposed sale only in extraordinary circumstances. The cited cases are without application to the issues here existing inasmuch as the petitioner is not an executor possessing both statutory and testamentary powers but is a temporary administrator with limited statutory authority and is acting as a conservator of assets pending the appointment of a permanent estate representative. The facts pertinent to the Bourne decisions have been stated in Matter of Bourne (22 Misc. 2d 681 and 11 App. Div. 2d 128) and do not need repetition here. The most pertinent fact is that a public sale by executors was directed by this court in that estate and ultimately the appellate courts reached the identical result. Submit orders on notice.

discounted

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PLAINTIFF'S MOTION FOR SUMMARY JUDGMENT

Plaintiff moves that the Court enter, pursuant to Rule 56 of the Federal Rules of Civil Procedure, a summary judgment for the relief demanded in the complaint on the ground that there is no genuine issue as to any material fact and that plaintiff is entitled to a judgment as a matter of law.

In support of this motion plaintiff relies upon the pleadings, the depositions of defendants Cecil D. Kaufmann and Joel S. Kaufmann and exhibits thereto, the defendants' response to the plaintiff's request for admission, and plaintiff's annexed affidavit.

Joseph Forer

David Rein
Attorneys for Plaintiff

Certificate of Service

I certify that on this 2nd day of January 1970, copies of the foregoing Plaintiff's Motion for Summary Judgment, together with the affidavit in support thereof of Walter A. Weiss and the Memorandum of Points and Authorities in support thereof, were mailed, first class, post prepaid, to Hugh B. Cox, Esq., 888 16th St. N. W., Washington, D. C. 20006, attorney for defendants Cecil D. Kaufmann and Simon Hirshman; Francis M. Shea, Esq., 734 15th St. N. W., Washington, D. C. 20005, attorney for defendant Joel S. Kaufmann; and David G. Stevenson, Esq., 805 Colorado Building, 1341 G St. N.W., Washington, D.C. 20005, attorney for defendant Kay Kewelry Stores, Inc.

Joseph Forer

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STATEMENT OF GENUINE ISSUES
AFFECTING DEFENDANT JOEL S. KAUFMANN

Defendant Joel S. Kaufmann has today filed a memorandum of points and authorities in opposition to the motion for summary judgment filed by the plaintiff in this action. As required by Rule 9(h) of this Court, he now files this statement of material facts as to which there is a genuine issue necessary to be litigated in connection with plaintiff's claims against him.

1. Whether the judicial sale at which certain stocks in subsidiaries and affiliates of Kay Jewelry Stores, Inc., ("Kay") were sold on June 7, 1966, was a "corporate opportunity" of Kay, and, in connection therewith:

a) whether the acquisition of the shares was essential to Kay's business or promoted an established corporate policy of Kay;

b) whether the opportunity to acquire the shares at the sale was brought about by Joel Kaufmann acting in his individual capacity;

c) whether Joel Kaufmann, in conducting the litigation that resulted in the sale and in purchasing the shares at the sale used his own assets rather than the assets of Kay;

d) whether Joel Kaufmann fully disclosed to Kay, before the sale was held, that the sale was to be held and that he proposed to bid upon the shares at the sale; and

e) whether Joel Kaufmann, in his individual capacity, had an "interest or expectancy" in the shares.

2. Whether, at the time that Joel Kaufmann purchased the shares at the sale, there was an agreement between Joel Kaufmann and Kay that Kay would buy the shares from Joel.

3. Whether Kay's directors, including defendants C.D. Kaufmann and Simon Hirshman, determined, in a good faith exercise of business judgment, not to attempt to purchase the shares at the sale.

4. Whether the contest of the will of Robert Kaufmann offered for probate by the plaintiff in this action was or could reasonably be believed to be of benefit to Kay.

5. Whether an allocable portion of the costs of contesting the will of Robert Kaufmann represented or could reasonably be believed by Joel Kaufmann and the other directors to represent part of Joel Kaufmann's cost of acquisition of the shares.

Respectfully submitted,

Of Counsel:

Shea & Gardner

734 Fifteenth Street, N.W.
Washington, D.C. 20005

Francis M. Shea
Martin J. Flynn
Peter A. Hornbostel

Attorneys for defendant
Joel S. Kaufmann

[Certificate of Service Omitted in Printing]

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AFFIDAVIT OF JOEL S. KAUFMANN

Joel S. Kaufmann, being duly sworn, deposes and says:

1) I am the same Joel S. Kaufmann who is named as a defendant in this action and whose deposition was taken by plaintiff on February 7, 1969.

2) Prior to the Surrogate's sale on June 7, 1966, referred to in the pleadings in this action, I spoke to C. D. Kaufmann, Simon Hirshman, and other officers and directors of Kay Jewelry Stores, Inc. ("Kay") on many occasions with respect to the progress of the litigation in which I was contesting a purported will of my late brother, Robert Kaufmann. Because Robert's estate included substantial amounts of stock in various Kay subsidiaries, these officers and directors were interested in the outcome of that litigation. I therefore showed to C. D. Kaufmann and Simon Hirshman and, probably, others, shortly after it was rendered in 1964, a copy of the opinion of the Appellate Division of the New York Supreme Court affirming a judgment which set aside on grounds of undue influence Robert's purported will leaving virtually his entire estate to Walter Weiss, the plaintiff in this action. Further I discussed the findings in that opinion with many of the directors of Kay. A copy of that opinion, In Re Kaufmann's Will, 20 A.D.2d 464, 247 N.Y. S.2d 664 (1964), is attached hereto as Exhibit A.

3) Prior to the Surrogate's sale referred to above, I arranged a line of credit in the amount of $500,000 from The Riggs National Bank in Washington, D.C., to finance my intended purchase of the shares being offered for sale. This line of credit was secured exclusively

by my personal credit and that of a company of which my brother Aron and I are sole owners. It was my judgment that the shares might be sold at the auction for any price up to approximately $500,000. Walter Weiss had contended in the Surrogate's Court that the shares were worth at least that much, and I believed that Weiss would attempt to buy the shares if he could obtain financing.

4) It was my intention to bid on the shares being offered at the Surrogate's sale, and if necessary, to purchase them, regardless of whether or not Kay would subsequently buy some of these shares from me. One of my objectives in undertaking the will contest litigation in the first place was to keep Robert's shares in Kay's subsidiaries and affiliates and in other companies in which I was interested out of the hands of Weiss, whom I regarded as a serious troublemaker and threat to the sound operations of these companies. If I did not bid at the sale, I believed that Weiss or persons with whom Weiss was associated might well acquire the stock, thereby achieving what I had set out to prevent in the will contest litigation itself. Moreover, I had, at the time of the sale, invested approximately $290,000 in the expenses of that litigation. The only ways open to me to recoup a portion of these expenses were either to acquire the stock at the sale and subsequently resell it, or to bid up the price to the point where the residual estate, in which my children had a one half interest, would receive a substantial amount for the shares....

5) At the time that I purchased the shares, I had no agreement or understanding with Kay that Kay would buy the shares from me, except that I had told C. D. Kaufmann that I would be willing to sell the shares

to Kay at the price I paid at the sale plus the allocable share of my expenses in the litigation which resulted in the sale, and C. D. Kaufmann had told me that he would recommend to Kay's board of directors that Kay acquire the shares in its subsidiary and affiliated companies from me on this basis, so long as the price of the shares did not exceed book value. I had no certainty prior to the July 1, 1966 vote by the board of directors that the other directors would accept this recommendation, and I did not expect C. D. Kaufmann to vote on the recommendation, as indeed he did not.

6) As I have stated above, I did not purchase the shares for the purpose of reselling them to Kay. I did hope to be able to sell the shares in the Kay subsidiaries to Kay, but at no time did I suggest terms of sale that, in my judgment, would yield any profit to me. The terms of the sale as completed did not yield any profit to me, but rather I received only my cost of acquisition, less some expenses that I should have added to my list of expenses. I believed then and I continue to believe that the will contest expenses were part of my cost of acquisition.

Joel S. Kaufmann

Subscribed and sworn to before me, a notary public in and for the District of Columbia, this 12th day of March, 1970.

Notary Public

My Commission Expires August 31, 1973

[Caption Omitted in Printing]

STATEMENT OF GENUINE ISSUES AFFECTING DEFENDANTS CECIL D. KAUFMANN AND SIMON HIRSHMAN

In accordance with Rule 9(h) of this Court, defendants Cecil D. Kaufmann and Simon Hirshman submit this statement of genuine issues setting forth the material facts as to which there is a genuine issue necessary to be litigated in connection with the claims made against them.

1. Whether before or at the time Joel S. Kaufmann purchased at auction on June 7, 1966, stock in subsidiary corporations largely or partly owned by Kay Jewelry Stores, Inc. (the "Company"), there existed an arrangement between Joel and the Company or its directors for the resale of that stock to the Company.

2. Whether the offer of the stock at the auction, referred to in paragraph 1 above, constituted a "corporate opportunity" of the Company.

3. Whether the successful contest of the will of Robert D. Kaufmann sought to be probated by Walter A. Weiss constituted, or could reasonably be believed to constitute, a benefit to the Company.

4. Whether an allocable portion of the costs of the contest of the will, referred to in paragraph 3 above, represented, or could reasonably be believed to represent, a cost to Joel S. Kaufmann in acquiring the stock referred to in paragraph 1 above.

5. Whether Cecil D. Kaufmann and Simon Hirshman acted in good faith and reasonably within the scope of their

business judgment in each and every step taken by them in connection with the acquisition by the Company of the stock described in paragraph 1 above.

Respectfully submitted,

HUGH B. COX

MICHAEL BOUDIN
888 Sixteenth Street, N. W.
Washington, D. C. 20006
293-3300

Attorneys for Cecil D. Kaufmann and Simon Hirshman

March 13, 1970

[Caption Omitted in Printing]

AFFIDAVIT OF SIMON HIRSHMAN

CITY OF WASHINGTON)
) SS:
DISTRICT OF COLUMBIA)

I, Simon Hirshman, being duly sworn according to law, depose and say:

1. I am the Simon Hirshman who is a party in the above-entitled case. I am a director, secretary and general counsel of Kay Jewelry Stores, Inc. (the "Company"), and I have held those positions since the formation of the Company in 1953.

2. Attached to this affidavit as Exhibit A is a copy of a letter dated "22 August 1967" and bearing the signature "Walter A. Weiss" copies of which were received in

August 1967 by some of the managers of branches of the Company, and its subsidiary or affiliated corporations.

3. From 1959 and thereafter until sometime during 1968, the Company was subject to the terms of an agreement, dated February 25, 1959, with The Prudential Insurance Company of America by which a loan of $5 million was made to the Company by Prudential. Attached to this affidavit as Exhibit B are true copies of paragraphs 6 through 6D and paragraph 10B of the agreement which relate in part to limitations upon the Company's acquisition of stock or securities in corporations which are not subsidiaries as defined by the agreement. Paragraph 6C(3)(ix) allows certain transactions otherwise prohibited to the Company, including acquisition of stock or securities in corporations which are not subsidiaries, so long as specified guarantees, obligations, investments, loans, and advances do not exceed $350,000. I am informed by the controller of the Company that as of June 7, 1966, the Company had outstanding such specified guarantees, obligations, investments, loans, and advances to the extent of approximately $112,000.

4. Attached to this affidavit as Exhibit C is a true copy of Article XII of the Certificate of Incorporation of the Company, a Delaware corporation.

Subscribed and sworn before me
this 12 day of March, 1970.

SIMON HIRSHMAN

Notary Public, D. C.
My Commission Expires August 31, 1973

[Caption Omitted in Printing]

ANSWER TO INTERROGATORY PROPOUNDED TO
DEFENDANT, KAY JEWELRY STORES, INC.

Defendant, KAY JEWELRY STORES, INC., by its Assistant Treasurer hereby answers the Interrogatory propounded to it by plaintiff:

Question:

"State when Kay Jewelry Stores, Inc. paid defendant, Joel S. Kaufmann $397,300.29 for the securities purchased from him, as admitted in paragraph 12 of the Answer of Kay Jewelry Stores, Inc. (If the amount was not paid in a single lump sum, give the date and amount of each installment.)"

Answer:

Kay Jewelry Stores, Inc. paid defendant, Joel S. Kaufmann $397,300.29 for the securities purchased from him as follows:

December 12, 1966	$ 205,330.03
December [illegible], 1966	[illegible]
January 10, 1967	6,570.00
Total	$ 397,300.29

KAY JEWELRY STORES, INC.

BY: Donald E. Hudson
DONALD E. HUDSON
ASSISTANT TREASURER

DISTRICT OF COLUMBIA: SS

DONALD E. HUDSON, being duly sworn deposes and says that he is the Assistant Treasurer of Kay Jewelry Stores, Inc. and has authority to answer the aforegoing Interrogatory on behalf of Kay Jewelry Stores, Inc.; that he has read the foregoing Answer to the Interrogatory Propounded to Defendant Kay Jewelry Stores, Inc. and that the same is true.

Donald E. Hudson
DONALD E. HUDSON

Subscribed and sworn to before me this 20 day of March, 1970.

Edwin [illegible]
Notary Public, D.C.
My Commission Expires May 31, 1971

[Caption Omitted in Printing]

DEFENDANTS' SUPPLEMENTAL STATEMENT OF GENUINE ISSUES

On January 21, 1970, plaintiff filed a Motion for Summary Judgment in this action, together with a Memorandum of Points and Authorities and a Statement of Material Facts. Defendant Joel S. Kaufmann and defendants C. D. Kaufmann and Simon Hirshman, pursuant to extensions, filed Memoranda in Opposition and Statements of Genuine Issues on March 13 and March 15, respectively. On April 22, plaintiff filed Plaintiff's Reply to Memoranda Opposing Summary Judgment, in which, among other things, he raised issues of material fact for the first time. Therefore, the defendants now file this Supplemental Statement of Genuine Issues, contending that each of the following is a genuine issue necessary to be litigated in this action.

The issues of material fact raised for the first time by plaintiff on April 22 are as follows:

(1) Whether the price paid by Kay Jewelry Stores, Inc. to Joel Kaufmann for the shares at issue was in excess of their fair or intrinsic value to the company;

(2) Whether the purchase of the shares by Kay, irrespective of the price paid for them, was for a legitimate corporate purpose;

(3) Whether the value to Aron Kaufmann and the children of Joel Kaufmann of their half interest in the residuary estate of Robert Kaufmann under his 1955 will amounted to $500,000 or was otherwise more than sufficient to compensate Joel Kaufmann for the expenses of successfully contesting Robert Kaufmann's 1958 will;

(4) Whether the surrogate's order, which authorized the sale of the shares at issue and other shares held by the Robert Kaufmann Estate in three separate blocks, could easily have been altered by defendant C. D. Kaufmann.

Respectfully submitted,

Francis M. Shea
Martin J. Flynn

734 Fifteenth Street, N. W.
Washington, D. C.

Attorneys for defendant Joel S. Kaufmann

Hugh B. Cox
Michael Boudin

888 Sixteenth Street, N. W.
Washington, D. C.

Attorneys for defendants C.D. Kaufmann and Simon Hirshman

Dated: April 28, 1970

[Certificate of Service Omitted in Printing]

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

WALTER A. WEISS	)	
Plaintiff,	)	CIVIL ACTION NO: 2248-68
vs.	)	
KAY JEWELRY STORES, INC., Et Al.	)	
Defendants.	)	

Washington, D. C.

April 29, 1970

The above-entitled matter came on for hearing before the HONORABLE GEORGE L. HART, JR., United States District Judge, at 11:14 a.m.

APPEARANCES:

On Behalf of the Plaintiff:

JOSEPH FORER, Esquire
DAVID REIN, Esquire

On Behalf of the Defendants:

FRANCIS M. SHEA, Esquire
HUGH B. COX, Esquire
DAVID G. STEVENSON, Esquire
MARTIN FLYNN, Esquire
MICHAEL BOUDIN, Esquire.

* * *

3 PROCEEDINGS

DEPUTY CLERK: Walter A. Weiss vs. Kay Jewelry Stores, Incorporated, Et Al, Civil Action No. 2248-68.

MR. FORER: If the Court please, my name is Joseph Forer; I represent the Plaintiff, Walter A. Weiss. This is a motion for summary judgement. . .

THE COURT: Which I have read.

MR. FORER: All right. Well then, let me then briefly summarize the facts. The gist of our case is . . .

THE COURT: That you've got a corporate opportunity that a director took personal advantage of.

MR. FORER: Not a corporate -- I don't consider it a corporate opportunity at all.

THE COURT: You don't?--what do you consider it?

MR. FORER: I consider it a case where in a self-dealing situation, Joel Kaufman in effect cheated the company out of a hundred and ninety-two thousand dollars by purchasing property with the intention and purpose of reselling it to the company at a profit; not only that, but all the evidence indicates that he not only sold it at a profit, that all the evidence indicates that the price at which he sold it was excessive and that there was no purpose for the purchase of the property other than to bail or rescue Joel from the fact that he had gotten financially embarrassed about paying heavy litigation fees in the will contest. Now. . .

* * *

47 MR. FORER: All right (withdrawing from the lectern).

COURT'S FINDING OF FACTS AND CONCLUSIONS OF LAW

THE COURT: While on some of the Plaintiff's theories in this case, there may be disputes, genuine disputes of issues of fact, the Court holds that there is no dispute, of genuine dispute of any issue of fact involving this question, and that is that the puchase by Joel S. Kaufman of the stock in question and its resale to Kay's was a scheme devised by the Defendants to reimburse Joel S. Kaufman for his personal expenses in a will contest unconnected with the corporate business of the case; that such on the part of the Defendants was a gross violation of their duties to the corporation and to the stockholders, and that the corporation is entitled to recover the excess price, and I'll grant summary judgment.

Present an order.

MR. FORER: Thank you, your Honor.

(Whereupon, Court recessed at 12:35 p.m.)

* * * * * * * * * *

CERTIFICATE OF REPORTER

The above-foregoing typewritten record is hereby certified as the official transcript in the above-captioned proceedings held before the HONORABLE GEORGE L. HART, JR., April 29, 1970, at 11:14 a.m.

Vernell A. Marshall

Vernell A. Marshall
Official Reporter

[Caption Omitted in Printing]

ORDER AND JUDGMENT

This cause came on to be heard on motion of the plaintiff for summary judgment pursuant to Rule 56 of the Federal Rules of Civil Procedure, and the Court having considered the pleadings, depositions, affidavits and the entire record, and counsel for the parties having been heard in open Court, and it appearing that there is no genuine issue as to any fact material to the disposition of the cause and that the plaintiff is entitled as a matter of law to the entry of judgment in favor of Kay Jewelry Stores, Inc. against the defendants Joel S. Kaufmann, Cecil D. Kaufmann and Simon Hirshman, it is by the Court this 7th day of May, 1970,

ORDERED that plaintiff's Motion for Summary Judgment be and is hereby granted; and it is further

ORDERED, ADJUDGED AND DECREED that the defendant Kay Jewelry Stores, Inc. recover of the defendants Joel S. Kaufmann, Cecil D. Kaufmann, and Simon Hirshman, jointly and severally, the sum of $191,870.26, plus interest at the rate of six per cent per annum on the sum of $185,300.26 from December 15, 1966, and on the sum of $6,570.00 from January 19, 1967; and it is further

ORDERED that the plaintiff Walter A. Weiss recover of the defendants Joel S. Kaufmann, Cecil D. Kaufmann and Simon Hirshman his costs of action; and it is further

ORDERED that the Court retains jurisdiction for the purpose of assessing and awarding counsel's fees and expenses upon application made after the time for appeal has expired or, in the event an appeal is taken, after disposition of the appeal.

JUDGE

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that Joel S. Kaufmann, one of the defendants in the above entitled action, hereby appeals to the United States Court of Appeals for the District of Columbia Circuit from the "Order and Judgment" granting plaintiff's motion for summary judgment entered in this action on the 7th day of May, 1970.

June 5, 1970.

Francis M. Shea
Francis M. Shea
Martin J. Flynn
734 Fifteenth Street, N. W.
Washington, D. C. 20005
Attorneys for Defendant Joel S. Kaufmann

[Caption Omitted in Printing]

NOTICE OF APPEAL

Notice is hereby given that Cecil D. Kaufmann and Simon Hirshman, defendants above named, hereby appeal to the United States Court of Appeals for the District of Columbia Circuit from the final order and judgment entered in this action on the 7th day of May, 1970.

June 5, 1970

Hugh B. Cox
HUGH B. COX

Michael P. Boudin
MICHAEL BOUDIN
888 Sixteenth Street, N. W.
Washington, D. C. 20006

Attorneys for Cecil D. Kaufmann
and Simon Hirshman

32-1

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,443

WALTER A. WEISS

v.

KAY JEWELRY STORES, INC., et al.,
CECIL D. KAUFMANN and SIMON HIRSHMAN,
Appellants.

No. 24,444

WALTER A. WEISS

v.

KAY JEWELRY STORES, INC.,
JOEL S. KAUFMANN,
Appellant.

CECIL D. KAUFMANN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS CECIL D. KAUFMANN AND SIMON HIRSHMAN

United States Court of Appeals
for the District of Columbia Circuit

FILED OCT 14 1970

Nathan J. Paulson
CLERK

October 14, 1970

HUGH B. COX
MICHAEL BOUDIN
OK

888 Sixteenth Street, N.W.
Washington, D.C. 20006

Attorneys for Appellants Cecil D. Kaufmann and Simon Hirshman

Washington, D. C. · THIEL PRESS · 202 · 393-0625

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TABLE OF AUTHORITIES

CASES:

MISCELLANEOUS:

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,443

WALTER A. WEISS

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Appellants.

No. 24,444

WALTER A. WEISS

v.

KAY JEWELRY STORES, INC.,
JOEL S. KAUFMANN,

Appellant.

CECIL D. KAUFMANN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANTS CECIL D. KAUFMANN AND SIMON HIRSHMAN

This brief is submitted on behalf of Cecil D. Kaufmann and Simon Hirshman, appellants in No. 24443. Their appeal has been consolidated with No. 24444 which is a separate appeal by Joel S. Kaufmann from the same judgment.

ISSUES PRESENTED FOR REVIEW*

The District Court granted summary judgment against appellants Cecil D. Kaufmann and Simon Hirshman on the ground that as directors of Kay Jewelry Stores, Inc., they breached their fiduciary duty by approving and participating in the Company's purchase of stock from Joel S. Kaufmann with the improper motive of benefitting Joel, and the court found Cecil and Hirshman personally liable in the amount of Joel's alleged gain on the sale.

The questions presented are:

1. Whether the court erred in granting summary judgment against Cecil and Hirshman on a finding that their motive was improper where they denied any improper motive for their actions, there was evidence to show legitimate corporate reasons for the transaction, and the court had no opportunity in the absence of a trial to appraise their credibility or consider other evidence pertinent to their good faith.

2. Whether the court erred in holding Cecil and Hirshman liable on summary judgment for the amount of Joel's alleged gain where concededly neither Cecil nor Hirshman had made any profit in the transaction for which they might be required to account, and any contentions that the stock was worth less than the Company paid for it or that the Company could have acquired it for a lower price involved disputed issues of fact.

REFERENCES TO RULINGS

The basis of the District Court's judgment is set forth in its unreported "Findings of Fact and Conclusions of Law" which were announced from the bench at the conclusion of the oral argument on the motion for summary judg-

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*This case has not previously been before this Court.

ment on April 29, 1970, and are included in the joint appendix (J.A. 184).

STATEMENT OF FACTS

This is an appeal from a judgment of the District Court entered in a derivative stockholder's suit. In the court below, the plaintiff moved for summary judgment which the individual defendants opposed on the ground, *inter alia*, that genuine issues of fact existed precluding any summary judgment. The court granted the motion, determining without trial or hearing oral testimony that the individual defendants had engaged in an illegal "scheme," and entered judgment in the amount of $191,870.26, plus interest (J.A. 184-85).[1]

Background of the Litigation. The plaintiff in this suit is Walter A. Weiss, a stockholder in the corporate defendant and a participant in relevant events discussed below. The individual defendants are three directors and officers of Kay Jewelry Stores, Inc. ("the Company")—Cecil D. Kaufmann, its president, Joel S. Kaufmann, treasurer, and Simon Hirshman, secretary and general counsel; the Company is a nominal defendant.[2]

The following events gave rise to this litigation: Robert D. Kaufmann, a brother of Joel and a cousin of Cecil, died

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[1] References designated "J.A. —" refer to the joint appendix. "Dep. Ex. —" refers to exhibits introduced in the depositions of defendants. "Tr. —" refers to pages in the transcript of the hearing on the summary judgment motion below.

[2] The present suit follows two previous unmeritorious suits in the District of Columbia courts brought or apparently instigated by Weiss charging fraud or unfairness against one or more of the defendants. See In re Kaufmann's Will, 20 A.D.2d 464, 473-74, 247 N.Y.S.2d 664, 673-74 (App. Div. 1964), aff'd per curiam, 15 N.Y.2d 825, 205 N.E.2d 864, 257 N.Y.S.2d 941 (1965); Opinion of Surrogate Cox, in In re Kaufmann's Will, supra, filed April 18, 1966 (J.A. 169).

in 1959. His last will left almost his entire estate to Weiss, who had acted as an "advisor" to him (J.A. 89-90). The estate included stock in 42 subsidiary corporations of the Company (J.A. 148), as well as stock in other enterprises in which Robert and Joel were jointly interested (J.A. 174).

Believing that the will offered by Weiss for probate in the New York Surrogate's Court was the result of his undue influence over Robert, Joel contested the will on behalf of his two sons who were substantial beneficiaries under Robert's immediately previous will (J.A. 90). Two juries concluded that Weiss had exercised undue influence, and the will leaving Robert's estate entirely to Weiss was ultimately denied probate. *In re Kaufmann's Will, supra,* 20 A.D.2d 464, 247 N.Y.S.2d 664. In May 1965, as litigation over the estate continued, the temporary administrator sought authority from the Surrogate's Court to sell at public auction all of the stock held by the estate (J.A. 163).

On several occasions thereafter during 1965 and 1966, Joel discussed the prospective auction with Cecil and, on at least one occasion, with Hirshman (J.A. 35, 99). Joel informed Cecil and Hirshman that he intended to bid for the stock held by the estate and that if there were competition at the auction he intended to see that the auction price was bid up to a point that would cover his expenses in the will contest litigation (J.A. 100; see J.A. 49). Joel also inquired of Cecil whether the Company might purchase from Joel the stock in the 42 subsidiary corporations in the event Joel purchased them from the estate but he asserted that his price to the Company would have to include his full cost of acquiring the stock including an allocable share of the will contest expenses (J.A. 37).

Cecil ultimately informed Joel that he would recommend to the Company's board of directors that it purchase the stock from Joel on the terms described above, so long as the total cost did not exceed the book value of the stock

(J.A. 41).[3] At the board of directors meeting on January 25, 1966, Cecil reported on Joel's inquiry, along with several other inquiries from persons interested in selling to the Company minority holdings in various of its subsidiaries (J.A. 139). The directors authorized Cecil "to negotiate for the purchase of such minority interests as he deems desirable and advisable . . ." (J.A. 139).

As the authorizing resolution indicates, the Company's interest in acquiring minority holdings in its operating subsidiaries was not limited to those Joel might acquire. During 1963 the Company had sought to acquire minority interests in a number of its subsidiaries by offering their owners shares of the Company in exchange. See opinion of Surrogate Cox, *supra* (J.A. 169). In 1966 and 1967 the Company on several occasions purchased from unrelated persons minority interests in various of the Company's operating subsidiaries.[4]

Following the January board meeting, there were apparently further conversations between Cecil and Joel. Cecil continued to contemplate that the Company would ultimately acquire the stock in question from Joel, but Cecil made no commitment prior to the auction that the Company would purchase the stock if Joel acquired it (J.A. 54-55, 61-62).

During these discussions Cecil had considered and rejected the course of having the Company bid directly for the stock in its subsidiaries at the auction (J.A. 44). Primarily, Cecil concluded that this alternative would cost the Company more because it would require the Company to

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[3] Joel had previously asked Cecil whether the Company would issue him Company stock in exchange for his subsidiary stock, but Cecil had indicated that it would not (J.A. 36).

[4] Details of the 1963 acquisition are contained in the record at J.A. 169. The facts concerning the 1966 and 1967 acquisitions were adverted to only in oral argument for reasons noted below. See p. 16, n. 18, infra.

engage in competitive bidding (J.A. 49). Cecil was also concerned that a show of interest by the Company at the auction might attract other bidders and increase the price substantially (J.A. 45).[5] Finally, the stock in these subsidiaries was offered in blocks several of which contained other estate stockholdings in corporations which were not subsidiaries of or connected with the Company (J.A. 148), and the Company's right to acquire stock in non-subsidiaries was in fact sharply confined by the terms of an outstanding loan agreement.[6]

After authorization by the Surrogate, the auction was held on June 7, 1966, and Joel purchased the estate stockholdings for $299,388.03; of this amount, $205,330.03 was allocable to the stock in the 42 subsidiaries of the Company. At the board of directors meeting on July 1, 1966, it was reported that Joel offered to resell the stock in the 42 subsidiaries to the Company for the price he paid for them at auction plus an allocable share of his expenses in the litigation which resulted in the auction. After discussion the board voted, with Cecil and Joel abstaining, to purchase the stock at a price including "all of the costs incurred by [Joel] in acquiring said shares," with the exact amount to be determined by audit but not to exceed $411,000 (J.A. 140). The latter figure was based on

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[5]Weiss had in fact made efforts to interest a competitor of the Company in acquiring the stock in question, and Weiss sought to delay the auction in attempts to find other bidders (Weiss' Answers to Interrogatories; Weiss' letter, August 22, 1967, attached to the affidavit of Simon Hirshman filed in opposition to summary judgment (J.A. 177)).

[6]The loan agreement prohibited the Company, on threat of default, from purchasing stock in corporations which were not its subsidiaries (J.A. 178). The agreement contained an exception allowing such purchases so long as they, together with specified other obligations and investments, did not exceed $350,000; at the time of auction the Company had utilized this exception to the extent of about $112,000 (J.A. 178). The auction price, of course, could not be determined in advance.

a preliminary estimate of Joel's litigation expenses then available to the board.

Joel thereafter submitted to an audit committee data establishing his costs and the committee prepared a written report to the board of directors (J.A. 142).[7] The report stated that the aggregate book value of the stock was $490,420.67 and it computed the total cost of the stock to Joel, including an allocable share of his will contest expenses, at $400,729.09 (J.A. 145). At the board of directors next meeting on September 28, 1966, the board, with Cecil and Joel again not voting, reconfirmed its decision to purchase the stock at the computed cost (J.A. 141). Subsequently the stock was transferred to the Company on payment of $397,200.29, the reduction being due to revised cost data submitted by Joel to the committee (J.A. 146).

District Court Proceedings. The present suit was brought by Weiss as a derivative stockholder's action against seven of the Company's directors charging that the transactions just described were a breach of fiduciary duty (J.A. 4). Inadequate service led to dismissal of the complaint as to four of the directors and the remaining three—Cecil, Joel, and Hirshman—filed answers denying any wrongdoing (J.A. 9, 13). Counsel for Weiss deposed both Cecil and Joel and conducted limited other discovery on several issues.[8] The individual defendants obtained from Weiss answers to several interrogatories.

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[7]The committee consisted of Donald Hudson (controller of the Company), James F. Rihtarchik (a CPA employed by the Company), and James R. Stoner (an attorney retained by the Company) (J.A. 64-70).

[8]Other discovery on behalf of Weiss consisted of a request for the admission of the genuineness of two documents involved in the Surrogate's Court proceedings and an interrogatory to the Company seeking a statement of the dates when payments were made by it to Joel in exchange for the stock in question (J.A. 163, 179).

At this stage Weiss moved for summary judgment (J.A. 170), including with his motion a single affidavit which did no more than establish his ownership of 106 shares of the Company's stock. The essential ground of the motion, as revealed by the supporting memorandum, was that Joel breached his fiduciary obligation to the Company by purchasing property for the purpose of resale to the Company at a profit and that he preempted a corporate opportunity when he purchased for himself property which the Company contemplated acquiring (Weiss Mem. 7-8). The liability of Cecil and Hirshman was alleged to follow from their approval of the Company's purchase of the stock from Joel and their participation with him in the transaction, although admittedly they "did not profit from the [alleged] breach of trust" (Weiss Mem. 10).

In response, the three individual defendants all contended that numerous disputed issues of fact pertinent to claims and defenses prevented a summary judgment; for example, specified contested issues included Weiss' allegations that Cecil and Hirshman had acted in bad faith for an improper motive.[9] Moreover, summary judgment was opposed on the legal ground that controlling decisions entitled a corporate executive to buy and to resell to his corporation property in which he had a pre-existing interest such as Joel's interest under Robert's penultimate will in the stockholdings of Robert's estate.[10]

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[9] In addition to their respective statements of genuine issues (J.A. 171, 176), the defendants filed memoranda in opposition to summary judgment arguing questions of law and showing how specified disputed issues were or turned upon contested evidentiary facts. At this stage the defendants also filed affidavits of Joel and of Hirshman relating to a variety of issues (J.A. 173, 177).

[10] In this connection, the defendants cited authorities showing that the corporate opportunity doctrine does not prevent an executive from acquiring property in which he has a pre-existing interest to protect regardless of his corporation's desire to obtain the property. E.g., Twin-Lick Oil Co. v. Marbury, 91 U.S. 587 (1875); Lipkin v. Jacoby, 42 Del. Ch. 1, 202 A.2d 472 (Ch. 1964). Once the executive has

Cecil and Hirshman also objected to summary judgment against them on the additional ground that—regardless of whether Joel could buy and resell the stock—governing law precluded liability as to Cecil and Hirshman absent a finding of bad faith or negligence on their part since they were neither financially interested in the transactions nor alleged to have profited by them. See pp. 11-12, *infra.* They argued that their bad faith or negligence could not be established on summary judgment in light of their denials of improper motives, the evidence of legitimate corporate reasons for the transactions and the settled rule that summary judgment is not normally appropriate on questions of motive or intent. See pp. 13-22, *infra.*

Weiss in his reply memorandum introduced for the first time the additional argument that the Company had no legitimate reason to acquire the stock of its subsidiaries and had paid Joel more than the stock was worth (Weiss Reply Mem. 16-17).[11] No affidavits or additional evidence on these questions accompanied the reply. The individual defendants filed a supplemental statement of the disputed issues specifying as contested issues of fact the Company's interest in acquiring the stock in question and the fairness of the price paid (J.A. 180).

Immediately following oral argument of the motion for summary judgment, the court granted summary judgment

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legitimately acquired the property, the law is equally clear that he may resell it to his corporation at a price higher than he paid. E.g., Flint River Pecan Co. v. Fry, 29 F.2d 457, 459 (5th Cir. 1929); New York Trust Co. v. American Realty Co., 244 N.Y. 209, 155 N.E. 102 (1926).

[11] Neither in his complaint nor his main memorandum below did Weiss allege that the Company had no reason to purchase the stock or that the price exceeded its value. On the contrary, the express claim was that Joel had made an unlawful "profit" (e.g., J.A. 7) which the Company was entitled to recover "even if the price it paid did not exceed the true value" (Weiss Mem. 8).

from the bench. At the same time, the court delivered the following oral statement denominated "Finding of Facts and Conclusions of Law":

> "While on some of the Plaintiff's theories in this case, there may be disputes, genuine disputes of issues of fact, the Court holds that there is no dispute, of genuine dispute of any issue of fact involving this question, and that is that the purchase by Joel S. Kaufman of the stock in question and its resale to Kay's was a scheme devised by the Defendants to reimburse Joel S. Kaufman for his personal expenses in a will contest unconnected with the corporate business of the case; that such on the part of the Defendants was a gross violation of their duties to the corporation and to the stockholders, and that the corporation is entitled to recover the excess price, and I'll grant summary judgment" (J.A. 184).

Thereafter, the court entered a judgment holding the three individual defendants jointly and severally liable for $191,870.26, plus interest (J.A. 185). This figure represented the difference between the price the Company paid Joel for the stock and the price he paid for it at the auction. The court filed no written opinion discussing either the evidence or the legal questions in the case and made no further findings or conclusions beyond the several sentences delivered at oral argument and set forth above.

ARGUMENT

I. THE VALIDITY OF THE JUDGMENT BELOW DEPENDS ENTIRELY UPON THE COURT'S FINDING THAT THE INTENT OF CECIL AND HIRSHMAN WAS IMPROPER AND UNLAWFUL BECAUSE THEIR MOTIVE WAS TO BENEFIT JOEL.

The District Court rested its judgment of liability entirely on a single finding that "the purchase by Joel S. Kaufman of the stock in question and its resale to Kay's was a scheme devised by the Defendants to reimburse Joel S. Kauf-

man for his personal expenses" in a will contest not connected with the business of the Company (J.A. 184). As applied to Cecil and Hirshman the plain meaning of this finding is that they are liable solely because they acted in bad faith, that is to say, their actions were prompted by the improper and unlawful motive and intent to benefit Joel without regard for the Company's interests.

In the circumstances of this case, a valid finding of bad faith was essential to any judgment of liability against Cecil and Hirshman. It is undisputed that neither of them had any personal interest in or received any benefit from the transactions in question. Under the law of Delaware, which governs here,[12] it is well established that a director who has no personal interest in and has derived no profit from the transaction alleged to be unlawful can be held liable only upon a showing of bad faith or negligence. See, *e.g.*, *Cheff v. Mathes*, 41 Del. Ch. 494, 199 A.2d 548 (1964); *Hoffman v. Dan*, 205 A.2d 343, 350 (Del. 1964).[13]

In the face of this controlling rule of law the assertion made by Weiss in the court below that without regard to motive, a director who preempts a "corporate opportunity" to his advantage is subject to a "constructive trust" of the proceeds and liable for any "profits" from his action (Weiss Mem. 8) is not applicable to Cecil and Hirshman. Assuming that a director who profits from such a transaction may be liable regardless of his intent it is not and cannot be contended that Cecil and Hirshman obtained any profit or

[12]The Company is incorporated in Delaware and the fiduciary duty of its directors is determined under Delaware law. See, e.g., Mayflower Hotel Stockholders' Protective Comm. v. Mayflower Hotel Corp., 89 U.S. App. D.C. 171, 173-74, 193 F.2d 666, 668-69 (1951).

[13]Delaware decisions explicitly distinguish, in appraising transactions between a corporation and one or more of its directors, between directors "having personal or pecuniary interests in the transaction" and those who may approve and sanction it but are otherwise disinterested; the latter, at least, are merely required to have acted in "good faith" and with requisite care. See Cheff v. Mathes, supra, 41 Del. Ch. at 505, 199 A.2d at 555.

benefit whatsoever from the transactions in question. It may also be observed that there are disputed questions of both fact and law involved in the corporate opportunity issue. See, *e.g.*, p. 8, n. 10, *supra;* the trial court did not even purport to decide these questions.

Whether or not Joel in view of his preexisting interest and other circumstances could properly purchase the stock and resell it to the Company at a higher price, liability of Cecil and Hirshman must be independently established. The Delaware decisions make it clear that a disinterested director has not breached his fiduciary duty merely because he has approved or sanctioned a corporate transaction for which another director is held liable on account of improper purpose, self-interest or any other ground. See, *e.g.*, *Bennett v. Propp*, 41 Del. Ch. 14, 187 A.2d 405 (1962); see p. 11, n. 13, *supra*. The disinterested director is liable only if, in the particular circumstances, he is found to have acted in bad faith or negligently. *Id.*

In the present case only the issue of bad faith is relevant. The court below made no finding or suggestion of negligence but rested its judgment solely on a determination of bad faith. Indeed, the gravamen of Weiss' complaint and argument from the outset of the case has been that Cecil and Hirshman acted with dishonest intent and not that their actions constitute negligence (*e.g.*, Weiss Reply Mem. 19). Furthermore, Delaware law gives very wide latitude to decisions made by disinterested directors and would require a far stronger showing than is found in the record here as a basis for holding disinterested directors liable for negligence.[14] The same facts discussed below

[14] E.g., Karasak v. Pacific Eastern Corp., 21 Del. Ch. 81, 180 Atl. 604 (Ch. 1935); Wyles v. Campbell, 77 F.Supp. 343, 349 (D. Del. 1949); cf. Poirier v. Welch, 233 F.Supp. 436, 439 (D.D.C. 1964). The Delaware Supreme Court stated in Lieberman v. Becker, 38 Del. Ch. 540, 547, 155 A.2d 596, 600 (1959), "a decision by responsible businessmen reached after careful consideration of . . . [the relevant] factors, without bad faith or fraud is entitled to weighty consideration by the courts."

(pp. 16-20, *infra*) which preclude summary judgment on the question of bad faith similarly establish sufficient reason for defendants' actions to preclude a finding of culpable negligence.

It follows from what has just been said that the validity of the judgment below depends entirely on the court's finding that Cecil and Hirshman acted in bad faith, both because that was the sole basis for the court's decision and because under the controlling principles of substantive law such a finding is essential to any imposition of liability. The decisive question, therefore, is whether in the circumstances of this case the court properly determined the issue of bad faith on a motion for summary judgment.

II. UNDER SETTLED PRINCIPLES OF LAW AND THE FACTS OF THIS CASE, THE COURT COULD NOT PROPERLY FIND ON SUMMARY JUDGMENT THAT CECIL AND HIRSHMAN ACTED IN BAD FAITH FOR AN IMPROPER MOTIVE.

Under Rule 56 of the Federal Rules of Civil Procedure, summary judgment is appropriate only if the parties seeking it can "show that there is no genuine issue as to any material fact . . . ." Necessarily, the facts and evidence in each individual case ultimately determine whether or not this standard has been met. However, in appraising the relevant circumstances, fully discussed below, the more general cautions of the courts in administering Rule 56 are pertinent.

In the words of the principal commentator on the Federal Rules, "summary judgments are to be cautiously granted." 6 Moore, *Federal Practice* ¶ 56.15 [1.-2], at 2315 (2d ed. 1966) (footnote omitted). This Court itself has stated that in passing upon summary judgment motions doubts "are to be resolved against the granting of summary judgment." *Dewey v. Clark*, 86 U.S. App. D.C. 137, 145, 180 F.2d 766, 772 (1950). In sum, if there is to be error it

should be in denying summary judgment and "in favor of a full trial." 6 Moore, *supra*, para. 56.15 [1.-2], at 2316.

In particular, suits involving claims of fraud or breach of fiduciary duty, or otherwise turning upon issues of motive or intent, are not normally appropriate for disposition on summary judgment for obvious reasons such as the range of facts likely to be relevant and the importance of demeanor evidence.[15] Thus, the normal presumption against summary judgment is especially pronounced when such issues are involved, and this must be borne in mind in appraising the particular facts.

The District Court's finding that Cecil and Hirshman acted in bad faith for the improper purpose of advancing Joel's interests rather than those of the Company was based wholly upon inferences and was not supported in any degree by direct evidence of improper motive. Both Cecil and Hirshman have consistently denied wrongdoing,[16] and in his deposition Cecil explained in detail his reasons for believing that he was acting in the best interests of the Company (see pp. 16-19, *infra*). There are no contemporaneous documents or other evidence of contemporaneous statements by Cecil or Hirshman that provide any support for the view that their intent was to benefit Joel at the expense of the Company. On the contrary, the contemporaneous documents—as for example, the minutes of the

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[15] E.g., White Motor Co. v. United States, 372 U.S. 253 (1963); Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962); Levin v. Joint Commission, 122 U.S.App. D.C. 383, 354 F.2d 515 (1965); F.S. Bowen Electric Co. v. J.D. Hedin Construction Co., 114 U.S. App. D.C. 361, 316 F.2d 362 (1963); Fogelson v. American Woolen Co., 170 F.2d 660 (2nd Cir. 1948); 6 Moore, supra, para. 56.17[41].

[16] For example, as Cecil stated in describing his discussions with Joel prior to the auction, "first of all you must understand that . . . I was representing Kay Jewelry, Inc. and I couldn't or wouldn't do anything even in favor of Joel if I thought it was to the detriment of the company" (J.A. 45).

board meetings at which the transaction was considered (J.A. 139-42)—are consistent with and, indeed, support the position of Cecil and Hirshman that they acted throughout in good faith.

In substance, therefore, the District Court's finding of bad faith was necessarily based upon the inference that the acts done by the defendants, in all the circumstances including defendants' knowledge of relevant facts, precluded any explanation for such actions other than bad faith. Yet, on any motion for summary judgment, it is settled that "the inferences to be drawn from the underlying facts . . . must be viewed in the light most favorable to the party opposing the motion." *United States v. Diebold, Inc.*, 369 U.S. 654, 655 (1962).[17] It follows that unless the explanations for the actions of Cecil and Hirshman are too incredible or preposterous even to *permit* the conclusion after a full trial that they acted in good faith, then summary judgment was wrongly entered.

While the District Court did not identify what act or acts of Cecil and Hirshman provided the precise basis for its inference that they necessarily acted in bad faith, the record furnishes a reasonable explanation for each of the decisions with which they might be charged: acquisition of the stock in the 42 subsidiaries by the Company; consent to the price paid for the stock; and failure to have the Company itself bid for the stock at auction as an alternative means of acquisition. In each instance the explanation is in the defendants' view entirely sound as a matter of business judgment, but in all events none of the explanations is so implausible as to compel the conclusion that defendants were motivated by bad faith.

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[17]Accord, Williamson v. Wilbur-Rogers, Inc., 381 F.2d 719 (6th Cir. 1967); Shulins v. New England Ins. Co., 360 F.2d 781 (2nd Cir. 1966); Pogue v. Great Atlantic & Pacific Tea Co., 242 F.2d 575 (5th Cir. 1957); 6 Moore, supra, para. 56.13[3].

First, there is nothing sinister or peculiar about a corporation's purchase of stock in its own subsidiaries. The existence of minority interests in operating subsidiaries of a parent corporation is notoriously a source of difficulty for the parent in matters of dividend policy, expansion, and many other areas of legitimate corporate activity. See 6A Fletcher, *Cyclopedia Corporations* §§ 2857-57.1 (1968). The difficulties of dispersed ownership in subsidiaries was especially acute in this instance because so many operating companies—42 in number—were involved (See J.A. 36).

Any suggestion that the Company made the purchase not to further the Company's interest but simply to assist Joel is inconsistent with the fact that it sought, and indeed made, purchases of stock in its subsidiaries in comparable cases from persons unconnected either with Joel or the management of the Company. The record shows that at the same January 1966 meeting of the board of directors at which Cecil reported on Joel's initial proposal, the board authorized Cecil to negotiate for purchases of minority interests from other persons (J.A. 139). The record also reflects the Company's acquisition of minority interests in its subsidiaries in 1963 (J.A. 169), and in point of fact the Company in both 1966 and 1967 made purchases of stock interests in its subsidiaries from minority holders having no other relation to the Company.[18]

The facts just recited amply support the express testimony of Cecil that he "felt that it would be in the company's interest and the stockholders protection if the com-

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[18]The 1966 and 1967 transactions were not discussed in defendants' papers opposing the motion for summary judgment solely because Weiss' complaint and moving papers did not attack the Company's interest in acquiring stock in its subsidiaries; rather, the attack was on the method of accomplishment and, in fact, asserted that the stock represented a "corporate opportunity" (Weiss Mem. 8). See p. 9, n. 11, supra. However, defendants' counsel stated in oral argument that these transactions had occurred and represented the evidence concerning them would be introduced at trial (Tr. 40-41).

pany owned the . . . shares" in question (J.A. 40). The other directors of the Company shared this view since they voted at both the July and September 1966 meetings to purchase the stock (J.A. 140-41). It is impossible to see how the acquisition of the stock itself suggests, let alone compels, an inference that it was motivated by bad faith.

Second, the decision to pay $397,200.29 for the stock similarly gives rise to no inference of bad faith and certainly not a conclusive inference. There was a reasonable basis for believing that an allocable share of Joel's will contest expenses could properly be regarded as part of his cost of acquiring the stock;[19] and apart from that consideration, the stark fact remains that the Company had no way of obtaining the stock from Joel at a lower price. As Cecil testified, from the outset of his discussions with Joel the latter had made it clear that he would not resell the stock except at a price including an allocable share of his litigation expenses (J.A. 37).

Nor does the record show that the intrinsic value to the Company of the stock was less than the price paid or that the defendants must necessarily have believed it to be less. The book value of the stock, $490,420.67 (J.A. 143), far exceeded the total price paid for it and the Company had additional legitimate reasons for seeking to obtain it beyond those of interest to an outside purchaser.[20] See p. 16, *supra*. Moreover, the judgment of Cecil and Hirshman that the terms of purchase were advantageous to the Company

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[19]Were it not for Joel's action in contesting Robert's will, the stock in question would have passed to Weiss whose relation with the Company certainly did not encourage prospects for its repurchase from him on any reasonable terms.

[20]Other criteria such as dividends and recent comparable transactions in the stock might also be pertinent to fixing its value, but book value is certainly one pertinent index. See, e.g., American Surety Co. v. Nash, 95 Ariz. 271, 389 P.2d 266 (1964); Matter of Jackson, 125 Misc. 787, 211 N.Y. Supp. 537 (Surrog. Ct. 1924); 9 Fletcher, Cyclopedia Corporations §4657 (1964).

were corroborated by all of the voting directors, some of whom had no other connection with the Company, in two separate board meetings.

Weiss' argument that the price paid exceeded the value of the stock rested on the assumption that the auction price definitively established the actual value of the stock. The trial court properly declined to give any substantial weight, let alone conclusive weight, to the price paid at an auction with one bidder (Tr. 10), and the court properly stated that if Weiss' case depended upon a showing that the price paid by the Company was "excessive" then "surely you've got to dispute a material fact in here" (Tr. 9).[21] Plainly if the price cannot be shown on summary judgment to be excessive, it provides no basis for an inference that its payment by defendants establishes their bad faith.

Third, the Company's method of obtaining the stock, by purchasing it from Joel rather than bidding for it at the auction, provides no ground for imputing bad faith to defendants. Joel had made it patently clear well before the auction that he "was going to bid [the stock] in and if there was competition on it I was going to see the price would be bid up to where if somebody wanted to buy it they would have to pay for my expenses" incurred in the will contest (J.A. 100). Consequently, the Company could

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[21] As the court stated in oral argument in response to the argument by Weiss' counsel that book value was irrelevant and the auction price was conclusive (Weiss Reply Mem. 16-17). "Well then if book value as a matter of law is not an indication of price . . . then certainly the auction price at which there's only one bidder is no indication of what it's worth" (Tr. 10). In asserting that the auction price definitively established the value of the stock, Weiss also emphasized that the actual price paid represented the upset price fixed by the Surrogate (see Weiss Reply Mem. 16-17). It is common knowledge, as the Surrogate expressly stated in this instance, that in fixing upset prices the question "is not one of actual valuation but only one of fixing the minimum price at which the securities are to be offered for sale . . ." (J.A. 169).

not expect to obtain the stock at the auction without competitive bidding and, in all likelihood, payment of a far higher price than the sum it ultimately paid to Joel directly.[22]

Cecil was also concerned that direct participation by the Company in the auction might excite the interests of other potential bidders and thus increase the price paid (J.A. 49-50). Moreover, the Company did not want to acquire the estate's stockholdings in corporations which were not subsidiaries of the Company, and the stock in these other corporations was offered at the auction in blocks together with subsidiary stock (see J.A. 148). The Company under an outstanding loan agreement was in fact severely limited in purchasing such non-subsidiary stock (see p. 6, n. 6, *supra*). As Cecil stated, for all these reasons "my business discretion or judgment told me it would be completely wrong" for the Company to bid at the auction (J.A. 45).

In the District Court Weiss quibbled with or sought to counter certain of the explanations made by defendants to account for their method of purchase and other challenged decisions, and the Company responded to the objections so far as it had opportunity to do so.[23] However, this very

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[22]At the time of the auction the will of Robert next in line for probate left only half the estate to Joel's children (J.A. 90), so that only half the amount paid for the estate stock at the auction would be certain of ultimately reaching Joel's family when the estate was distributed. For this reason, if Joel had bid the price of the stock to the level necessary to allow him to recoup his litigation expenses through the proceeds of the estate, then the Company would have had to pay more for the stock at auction than it ultimately paid for it by purchasing it directly from Joel.

[23]For example, Weiss in his reply memorandum argued that the prospect of competitive bidding by Joel was no excuse for the Company's failure to bid at the auction since Joel as a corporate officer could not lawfully bid against the Company and the Company failed to make any "remonstrance" to him (Weiss Reply Mem. 19). As counsel for Cecil and Hirshman noted in oral argument, the Company

process shows how inappropriate it is to determine on summary judgment the reasonableness of the defendants' actions, and then draw inferences about their motives, when neither can be evaluated without a full exploration and consideration of the myriad relevant facts which provide the context for the actions. The partial illumination of the issues available on summary judgment through discovery and pleadings simply is not an adequate substitute in such cases for a plenary trial.

Beyond the explanations for particular actions, there is other evidence contained in the record that weighs heavily against a determination that Cecil and Hirshman acted in bad faith. In particular, the record shows that both had stock interests in the Company and both would thus have suffered financially from any act or omission injurious to the Company (Dep. Exs. 6-7).[24] The record also shows that Cecil, far from being an instrument of Joel's wishes, declined to recommend an exchange of Company stock for Joel's shares in the subsidiaries—the proposal favored by Joel—because Cecil did not regard it as being in the Company's best interests (J.A. 36). Finally, it is not irrelevant that the other directors of the Company voted in favor of the acquisition of the stock expressing their own independent judgment that it was in the best interests of the Company.

Not only is a conclusive inference of bad faith unjustified in light of the facts discussed, but the grant of summary judgment was additionally improper because it

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had reason to believe that Joel was entitled to bid, in view of his preexisting interest (see p. 8, supra) (Tr. 43), and in any event the fact of the matter was that Joel had clearly expressed his intention to bid and indicated no lack of firmness in his resolve (J.A. 49, 100).

[24] Cecil's stock interest was very substantial (Dep. Ex. 7). The courts have given significant weight to such interests in countering accusations that an executive acted in bad faith. See, e.g., Gropper v. North Cent. Texas Oil Co., 35 Del. Ch. 198, 114 A.2d 231 (Ch. 1955); Lipkin v. Jacoby, 42 Del. Ch. 1, 202 A.2d 572 (Ch. 1964).

deprived the defendants of the opportunity to introduce further relevant evidence appropriate for trial. The prospect of such evidence is itself reason for deferring a final judgment on the disputed issues until a trial has allowed its considerations. See, *e.g.*, 6 Moore, *supra*, ¶¶ 56.15[4], [5]. Such evidence is present here and defendants called its attention to the District Court (*e.g.*, Tr. 39).

Since the central issue is whether the defendants acted in good faith, their credibility in affirming that they did so and explaining the reasons for their actions is critically important. Yet short of a trial there is no opportunity for the trier of fact to observe the very actors whose motives are in question even though those observations may be decisive. It is the settled rule that "credibility ought not, when witnesses are available, be determined by mere affirmations or denials that inherently lack the important element of witness' demeanor. . . . Indeed, it has been said that a witness' demeanor is a kind of 'real evidence' . . . ." *Colby v. Klune*, 178 F.2d 872, 873-74 (2d Cir. 1949).

Innumerable cases make this same point that summary judgment ought not be granted where an individual's credibility is at issue and the opportunity exists to have the individual examined and cross-examined in court.[25] Even if the facts already described encouraged a substantial doubt about the good faith of Cecil and Hirshman in the actions challenged in this case, it is impossible to understand why they should be denied the opportunity of explaining those actions, in full and in their own words, in a full trial where their demeanor can be evaluated before a final judgment is passed upon them.

[25] E.g., Sartor v. Arkansas Natural Gas Corp., 321 U.S. 620 (1944); Poller v. Columbia Broadcasting System, 368 U.S. 464 (1962); Arnstein v. Porter, 154 F.2d 464 (2d Cir. 1946); 6 Moore, supra, para. 56.15[4]. As the court said in this connection in Cross v. United States, 336 F.2d 431, 433 (2d Cir. 1946); "Summary judgment is particularly inappropriate where 'the inferences which the parties seek to have drawn deal with questions of motive, intent and subjective feelings and reactions'."

There are further persons whose testimony will be useful at trial in determining the good faith of the defendants. For example, whether the stock purchased by the Company was worth the price paid for it certainly has some bearing upon this question, yet it is equally apparent that the subject is one appropriate for an expert financial witness. Similarly, the testimony of other members of the board of directors of the Company would be pertinent in establishing that other informed businessmen, having no special ties with Joel, reasonably believed the acquisition of the stock to be in the best interest of the Company. The availability of such evidence is reason enough why summary judgment should not be granted on the present state of the record.

III. THE COURT COULD NOT PROPERLY ASSESS DAMAGES ON SUMMARY JUDGMENT AGAINST CECIL AND HIRSHMAN WHO ADMITTEDLY DID NOT PROFIT FROM THE TRANSACTION.

The court below held each of the individual defendants liable for what it designated "the excess price" (J.A. 184), namely, $191,870.26, representing the difference between the price paid by the Company to Joel for the stock in question and the lesser amount previously paid by Joel for the stock at the auction (J.A. 185). The court did not explain whether it regarded the award as a restoration of profits unlawfully obtained by a corporate fiduciary or as the measure of damages inflicted on the Company. It is the position of Cecil and Hirshman that they acquired no profits which they might be required to restore, and damage to the Company could not be properly established on summary judgment.

The profit measure of liability has no proper application in this case. Weiss apparently views as profit to Joel Kaufmann the difference between what the Company paid him for the stock and what he paid for it at auction. However, demonstrably Joel had no net gain on the transaction when due account is taken of his expenses in the will

contest. Since the stock would never have been offered at auction had not Joel contested the will, his expenses in doing so were in the most practical sense a cost of his acquiring the stock and he obtained no profit on the transaction in any sense relevant here.[26]

Even if Joel were taken to have profited from the transaction, Weiss himself has admitted that "Cecil Kaufmann and Simon Hirshman did not profit from the breach of trust . . ." (Weiss Mem. 10). It may be conceded *arguendo* that an unfaithful fiduciary may be held liable not only for "such loss" as the corporation suffered but alternatively in the amount necessary "to prevent the faithless trustee from unjustly enriching himself" through his breach of trust.[27] It is patent that neither Cecil nor Hirshman have enriched themselves, unjustly or otherwise, in the present case.

The inequity of requiring a restoration of profits from those not alleged to have made profits of any kind is not altered by any general principle, asserted by Weiss in the court below, that fiduciaries who act together in breach of their fiduciary obligation are jointly and severally liable (Weiss Mem. 10). The immediate question is not whether

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[26] It is well established that where a director is required to restore illegal profits to his corporation, the profits are measured by his net gain after the deduction of any expenses proximately related to the profits. Central R.R. Signal Co. v. Longden, 194 F.2d 310, 324 (7th Cir. 1952); Parker v. Nickerson, 137 Mass. 487, 497 (1884); 3 Fletcher, Cyclopedia Corporations § 950, at 450 (1959). As the court stated in the Longden case, there is no equitable reason why the costs "from which sprang the profits" should not be deducted in determining the amount to be repaid. 194 F.2d at 324.

[27] See Standard Machinery Co. v. Duncan Shaw Corp., 208 F.2d 61, 63 (1st Cir. 1953). The court there said in full:

> "It is fundamental that damages may be assessed in favor of a beneficiary against a defaulting trustee either to compensate the beneficiary for such loss as he may have sustained as a result of the breach of trust, or to prevent the faithless trustee from unjustly enriching himself as a result of his breach of fiduciary duty. Am. Law. Inst., Restatement, Trusts § 205; Scott, Trusts, § 205."

Cecil and Hirshman can be held liable but whether the measure of their own liability is unlawful profits which they admittedly did not obtain. Whatever abstract language the cases may employ, research discloses no decision in which a nonprofiting corporate director has himself been held liable by any measure except actual loss shown to his corporation, and there is no reason or equity in applying to such a director a restitutionary measure of recovery.

On the hypothesis that Cecil and Hirshman might nevertheless be held liable for any damage or loss to the Company, there is no basis in the present record for establishing the amount of such damage or loss if any. The conventional measure for damages where property has been bought at an excessive price or sold for an inadequate price is the difference between the true worth of the property and the amount paid or received. *E.g., Estate Counseling Service v. Merrill Lynch, Pierce, Fenner & Smith, Inc.*, 303 F.2d 527, 533 (10th Cir. 1962); *Upson v. Otis*, 155 F.2d 606, 610-11 (2d Cir. 1946) (Delaware law); *New York Credit Men's Adjustment Bureau, Inc. v. Weiss*, 278 A.D. 501, 105 N.Y.S.2d 604 (App. Div. 1951), *aff'd*, 305 N.Y. 1, 110 N.E.2d 397 (1953). As already shown in detail above, it cannot be found on summary judgment how much, if at all, the price paid by the Company exceeded the worth of the stock to it. See pp. 17-18, *supra*.

To recapitulate briefly, the evidence of record indicates that the Company paid far less for the stock than its book value, and the board of directors regarded the terms of the purchase as advantageous to the Company. The trial judge himself rejected the view that the price paid at the one-man auction was entitled to any weight (Tr. 10), and certainly any weight given to such a price is not conclusive. As the District Court indicated, the value of the stock certainly involved a disputed question of fact on which summary judgment would not be proper (Tr. 9).

Nor is there proof that the Company was damaged on any theory that, but for a breach of duty of Cecil and Hirshman,

it could have acquired the stock at a lower price than that paid to Joel. As a matter of fact, the only record evidence shows that Joel was determined to protect his interest in the estate and recoup his litigation expenses by bidding at the auction (J.A. 49, 100), so that any attempt by the Company to bid would have initiated a bidding contest whose outcome is at least speculative and certainly cannot be determined on the present record. The allegation by Weiss that it was unlawful for Joel to bid at all does not alter the facts just stated and the District Court certainly did not hold that Joel was disqualified from bidding to protect his pre-existing interest and investment. See p. 8, n. 10, *supra*.

In sum, even assuming that Cecil and Hirshman could properly be found on summary judgment to have acted in bad faith, neither made any profit that should be restored to the Company; and at the very least there is a disputed issue of fact whether the transactions they approved caused actual loss or damage to the Company and, if so, the amount of the loss or damage. Consequently, whatever the outcome of the case in any other respect, a trial is required as to Cecil and Hirshman on the question of damages.

CONCLUSION

The judgment below should be reversed and the case remanded for trial.

Respectfully submitted,

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October 14, 1970

IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,443

WALTER A. WEISS,

v.

KAY JEWELRY STORES, INC., et al.,
CECIL D. KAUFMANN and SIMON HIRSHMAN,
Appellants.

No. 24,444

WALTER A. WEISS,

v.

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JOEL S. KAUFMANN,
Appellants.

CECIL D. KAUFMANN, ET AL.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLANT JOEL S. KAUFMANN

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AUTHORITIES CITED

CASES:

*Cases chiefly relied on are marked by asterisks.

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BRIEF FOR APPELLANT JOEL S. KAUFMANN

STATEMENT OF ISSUES

This is an appeal from a summary judgment granted to plaintiff Weiss in a stockholder's derivative action. That judgment was entered by the United States District Court for the District of Columbia against three directors and officers of Kay Jewelry Stores, Inc.[1] (hereinafter "Kay")—Joel Kaufmann, appellant in this case, and Cecil D. Kauf-

[1] Kay was a nominal defendant.

mann and Simon Hirshman, appellants in No. 24443 (consolidated with this case). The judgment was based on a factual finding that the purchase by Joel Kaufmann of shares in companies that were affiliates or subsidiaries of Kay and Joel's subsequent sale of these shares to Kay "was a scheme devised by the defendants to reimburse Joel S. Kaufmann for his personal expenses in a will contest unconnected with the corporate business" of Kay, and on a legal conclusion that such a scheme violated the defendants' fiduciary duties to the corporation.[2] All the defendants denied the existence of any such scheme, and their denials were supported by their own accounts of the relevant transactions as well as the lack of any evidence that Kay's board of directors was in any way uninformed, misled, or dominated in connection with those transactions. In these circumstances the central question presented is:

(1) Whether the existence of a "scheme" in connection with the purchase and resale by Joel Kaufmann of shares in Kay affiliates and subsidiaries was not a material issue of fact as to which there was a genuine dispute that could not be appropriately resolved by summary judgment procedure?

PRIOR PROCEEDINGS IN THIS COURT

This case has not been heard previously by any panel of this Court.

REFERENCE TO RULINGS

The District Judge did not file a written opinion or any written findings of fact or conclusions of law. He did render an oral opinion at the close of arguments on the motion

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[2] Joint Appendix (hereinafter "J.A."), at 184. The symbol "Tr." is used in citing references to the transcript of the oral argument on April 29, 1970.

for summary judgment (J.A. 184), and that opinion is set forth in full in the margin.[3]

STATEMENT OF THE CASE

In 1966 Kay purchased from Joel Kaufmann certain shares of stock in its own affiliates and subsidiaries that Joel had acquired previously at a public auction. Weiss contends—and the District Court agreed—that these purchase and resale transactions were improper because they were parts of a scheme to strip Kay of its assets in order to enrich Joel and that the corporation should accordingly recover the $192,000 difference between the price for which it acquired the shares from Joel and the price for which Joel acquired them at the auction. We contend, as we did in the District Court, that the propriety of the transactions depends on the purposes and intentions of the parties—both Joel and Kay—and that as to these critical matters the evidence adduced during discovery proceedings created genuine factual disputes.

In this first part of our brief we set forth the relevant facts—those that are undisputed as well as our version of those in dispute. In the argument that follows we show why the factual disputes are legally significant—that is, we show what difference it would have made if our view of

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[3]"THE COURT: While on some of the Plaintiff's theories in this case, there may be disputes, genuine disputes of issues of fact, the Court holds that there is no dispute, of genuine dispute of any issue of fact involving this question, and that is that the purchase by Joel S. Kaufman of the stock in question and its resale to Kay's was a scheme devised by the Defendants to reimburse Joel S. Kaufman for his personal expenses in a will contest unconnected with the corporate business of the case; that such on the part of the Defendants was a gross violation of their duties to the corporation and to the stockholders, and that the corporation is entitled to recover the excess price, and I'll grant summary judgment."

the disputed facts had been accepted, as it might well have been by a jury but for the unwarranted summary disposition of the case.

We begin by describing very briefly certain events that occurred prior to 1966. We do this because, while there is no disagreement about these events, they help to explain the 1966 actions of Joel and Kay about which disputes do exist.

The Will Contest

The shares of stock around which the present controversy revolves were part of the estate left by Robert Kaufmann, Joel's brother, when he died in 1959. A purported will naming Weiss as sole executor and as beneficiary of virtually the entire estate, including the shares, was contested by Joel on the ground that it had been procured by undue influence. The litigation that ensued was protracted. Two juries found that Robert's contested will had indeed been procured by undue influence on the part of Weiss.[4] The final decree denying probate was affirmed by the New York Supreme Court, Appellate Division, *In Re Kaufmann's Will*, 20 A.D. 2d 464, 247 N.Y. Supp. 2d 664 (1964), and subsequently by the New York Court of Appeals, 15 N.Y. 2d 825, 257 N.Y. Supp. 2d 941 (1965). The opinion of the Appellate Division contains a detailed statement of the circumstances supporting the charge of undue influence—in effect the complete domination and constant exploitation of Robert by Weiss over a period of 10 years. We do not undertake to summarize that statement here, except to note its references to the facts that Joel was active in the management of the Kaufmann family business (relating principally to the operation of a chain of jewelry stores), that there had

[4] The decree denying probate based on the verdict of the first jury was reversed. *Matter of Kaufmann*, 14 A.D. 2d 411, 221 N.Y.S. 2d 601 (1961).

been "a skillfully executed plan by Weiss to gain the confidence of Robert [and] displace Joel as manager of his financial affairs," that—as the jury could reasonably have concluded—Weiss "conveyed to Robert false accusations as to Joel's integrity" and "willfully alienated Robert from his family by falsely accusing Joel of fraud and mismanagement in the conduct of the family business enterprises," and that Weiss's "intrusion upon the various enterprises of the Kaufmann family" included his instigation in 1953 of litigation in which Robert sought to block the formation of Kay. 247 N.Y.S.2d at 673, 674, 679, 681-683. We cite these references because that suggest compelling reasons, the relevance of which will appear shortly, why Joel was anxious to keep the stock holdings in Robert's estate out of the hands of Weiss.

The will next in line for probate after invalidation of the contested will was one in which half of Robert's residual estate, including the shares involved in this lawsuit, was left to Weiss and the other half was left to Joel's two sons (Deposition of Joel Kaufmann, hereinafter "J.K. Dep.", at 73; J.A. 90). The total litigation expenses that Joel incurred in the will contest up to that point, as later determined by a committee appointed to report on this matter to Kay's board of directors, were $284,838.28.

The Public Auction

In May 1965 the temporary administrator of Robert's estate[5] petitioned the New York Surrogate's Court for authority to sell at public auction certain securities forming part of the estate, in order to defray expenses of administration. The shares held by the estate in affiliates and subsidiaries of Kay—the ones involved in this lawsuit, herein-

[5] Weiss was removed as temporary administrator of the estate in October 1964. He was replaced by Arthur W. Graeff, who petitioned for the public auction.

after sometimes described as the "subsidiary shares"—were among those for which authority to sell was requested. The petition also sought sale authority with respect to securities in other companies, hereinafter sometimes described as the "non-subsidiary shares."

The petition of the temporary administrator was the subject of hearings before the Surrogate's Court at which sharply conflicting appraisals were presented concerning the value of the estate's stockholdings.[6] In an order dated April 29, 1966 [7] supported by an opinion dated April 20, 1966,[8] the Surrogate granted the petition and authorized the sale of the subsidiary and non-subsidiary shares to the highest bidder at public auction. The order divided the shares into three blocks, two of which contained both subsidiary and non-subsidiary shares and one of which contained subsidiary shares only, and fixed for each of these blocks a minimum price that the administrator was authorized to accept. As the Surrogate's opinion was careful to point out, the minimum price fixed for purposes of the public auction was not an appraisal or determination of the market value of the shares. The minimum price fixed by the order for the three blocks of shares, in the aggregate, was $299,388. Weiss had argued to the Surrogate that the shares had an actual value of at least $500,000. (Affidavit of Joel S. Kaufmann, para. 3; J.A. 174).

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[6]Weiss opposed any attempt to liquidate the shares held by the estate, but his position in this regard was discussed and rejected in the Surrogate's opinion approving the petition. Some of the conflicting appraisal testimony was also presented by Weiss. The appraisal problem, also discussed in the Surrogate's opinion, was due in part to the fact that the holdings were minority interests in companies whose stock was not actively traded or listed on any securities exchange.

[7]Deposition Exhibit 8 ; J.A. 148. The deposition exhibits in this case were all numbered consecutively and hereinafter will be cited as "Dep. Ex.____."

[8]Exhibit B to Plaintiff's Request for Admission of Genuineness of Documents; J.A. 169.

After Weiss obtained one postponement and sought another in an unsuccessful effort to locate other interested bidders, the public auction was held on June 7, 1966. The sole bidder was Joel Kaufmann, and the three blocks of shares were sold to him for $299,388 [9]—the minimum price that the administrator was authorized to accept (Dep. Ex. 9, at 3; J.A. 157). Roughly two-thirds of this sum—or $205,330.03 to be exact, as later determined by a committee appointed to report on the matter to Kay's board of directors—was paid on account of the subsidiary shares, while the balance was attributable to purchase of the non-subsidiary shares (Dep. Ex. 4; J.A. 143).

Contacts Between Joel Kaufmann, C.D. Kaufmann, and Kay

We turn back now to events that preceded the public auction. What these events demonstrate, in our view, is that Joel made full disclosure to Kay of his intention to bid at the public auction and that Kay, although it was interested in acquiring the subsidiary shares held by Robert's estate, made a reasonable business judgment that it would not be in its best interest to bid for those shares at the auction.

Joel resolved to bid individually on all the shares held by Robert's estate as soon as it appeared that they would be

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[9] To finance the acquisition, Joel utilized a $500,000 line of credit that he had arranged at the Riggs National Bank. Kay's credit was not involved in the financing. As Joel explained: "This line of credit was secured exclusively by my personal credit and that of a company of which my brother Aron and I are sole owners." (Affidavit of Joel S. Kaufmann, para. 3; J.A. 173-174). With respect to the fact that $500,000 in financing was obtained, Joel has stated:

> "It was my judgment that the shares might be sold at the auction for any price up to approximately $500,000. Walter Weiss had contended in the Surrogate's Court that the shares were worth at least that much, and I believed that Weiss would attempt to buy the shares if he could obtain financing." (Affidavit of Joel S. Kaufmann, para. 3; J.A. 174).

sold at public auction. He explained his reasons for this decision in an affidavit filed in the District Court:

> "It was my intention to bid on the shares being offered at the Surrogate's sale, and if necessary, to purchase them, regardless of whether or not Kay would subsequently buy some of these shares from me. One of my objectives in undertaking the will contest litigation in the first place was to keep Robert's shares in Kay's subsidiaries and affiliates and in other companies in which I was interested out of the hands of Weiss, whom I regarded as a serious troublemaker and threat to the sound operations of these companies. If I did not bid at the sale, I believed that Weiss or persons with whom Weiss was associated might well acquire the stock, thereby achieving what I had set out to prevent in the will contest litigation itself. Moreover, I had, at the time of the sale, invested approximately $290,000 in the expenses of that litigation. The only ways open to me to recoup a portion of these expenses were either to acquire the stock at the sale and subsequently resell it, or to bid up the price to the point where the residual estate, in which my children had a one half interest, would receive a substantial amount for the shares." (Affidavit of Joel S. Kaufmann, para. 4; J.A. 174.)

Joel did in fact intend, if there was competition at the auction, to bid the price up to a point that would cover his litigation expenses in the will contest (J.K. Dep. 83; J.A. 100).

Joel promptly disclosed his intentions concerning the auction to C.D. Kaufmann, who was his cousin and the president of Kay. Several discussions between Joel and C.D. Kaufmann then followed (described in deposition of C.D. Kaufmann, hereinafter "C.K. Dep.," at 16-24; J.A. 33-41). Joel indicated in these discussions that, if he acquired the shares, he would be willing to sell them to Kay at what he considered his true cost—that is, the purchase price at the auction plus the cost of the litigation that

resulted in the auction. C.D. Kaufmann's view was that it would be to Kay's advantage to obtain the subsidiary shares—since they "could be a source of considerable difficulty" if they fell into "other hands"[10]—but at the same time he made it clear that the company would have no interest in acquiring the non-subsidiary shares. He said that while he could make no agreement or commitment on the matter, he would recommend to the board of directors that Kay purchase any subsidiary shares acquired by Joel at the auction at Joel's asking price so long as that price did not exceed book value—that is, at a price representing the amount paid for the subsidiary shares at the auction, plus the portion of Joel's litigation expenses allocable to those shares, subject to an upper limit defined by the book value of the shares.[11]

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[10]Generally, C.D. Kaufmann "felt . . . that it would be in the company's interest and the stockholders' protection if the company owned the [subsidiary] shares." (C.K. Dep. 23; J.A. 40). As we will also show at the trial, Kay had a record of purchases and offers to purchase minority stock interests in its own subsidiaries. So, for example, while the will contest already described was still pending and while Weiss was still serving as temporary administrator of the estate, Kay made an offer to exchange its own shares for shares of five of its subsidiaries. This offer was made generally to all the shareholders in the five subsidiary companies, a class which in each case included Robert's estate. This offer was declined by Weiss, who thereupon instituted appraisal actions in the District of Columbia with respect to the shares for which the offer was made. The temporary administrator who replaced Weiss petitioned the Surrogate for authority to discontinue the appraisal actions and to accept Kay's exchange offer, and this petition was granted. See opinion of Surrogate dated April 20, 1966, Exhibit B to Response to Plaintiff's Request for Admission. (J.A. 169). Respecting the appraisal suits, the Surrogate found that "[t]he former temporary administrator [Weiss] lacked a sound basis for the institution of these actions in that he was not possessed of information sufficient to justify a conclusion that the actions could be beneficial to the estate."

[11]At the same time C.D. Kaufmann was unwilling to recommend the exchange of Kay stock for the subsidiary shares (C.K. Dep. 19, J.A. 36).

The possibility that Kay itself might bid at the auction was raised during the discussions between Joel and C.D. Kaufmann. The judgment of C.D. Kaufmann was that it would be a mistake for Kay to bid (C.K. Dep. 28-29; J.A. 45-46). First, he said, a show of interest by the company in the subsidiary shares might escalate the price substantially.[12] And second, it was not clear that the subsidiary shares could be bid in at the auction separately from the non-subsidiary shares.[13] If the shares were not separated for purposes of the bidding, then Kay would be forced to acquire the non-subsidiary shares in which it had no interest in order to obtain the subsidiary shares in which it did have an interest. Not only would Kay thus be saddled with an unwanted expenditure, but it would be required in the bargain to use up some of its limited authority to invest in securities issued by corporations other than its own subsidiaries. The source of the restriction on Kay's investment authority was an outstanding loan agreement with the Prudential Insurance Company of America under which Kay, on threat of defaulting a $5 million loan, could engage in certain specified transactions–including the purchase of securities of corporations other than subsidiaries–only to the extent of $350,000.[14] As of the date of the public auction, that authority had been exercised to the extent of

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[12] Even though he was a director of Kay, Joel's participation in the bidding presumably would not have the same potential for escalating the price since Joel had an obvious personal interest in the outcome–the 50 percent share of his two sons in the residual estate, to which the proceeds of the auction would be added. On the other hand, Kay's participation in the bidding might reasonably be thought to reflect the company's own confidence in the intrinsic value of the subsidiary shares.

[13] As we have seen (page 6, *supra*), pursuant to the Surrogate's order, the shares were in fact offered at the auction in three blocks, two of which contained non-subsidiary as well as subsidiary shares.

[14] The relevant paragraphs of the loan agreement appear in the record as Exhibit B to the Affidavit of Simon Hirshman.

approximately $112,000,[15] and Kay of course had no way of knowing what the auction price for the non-subsidiary shares would be. Kay did know, however, because of Joel's express intention of bidding the price up if there were competition at the auction, that it could not obtain the shares for the minimum price, and of course Weiss had contended that the shares to be auctioned were worth at least $500,000.

At a meeting of Kay's board of directors on January 25, 1966, C.D. Kaufmann reported on the possibility of acquiring from Joel the subsidiary shares that Joel might acquire from Robert's estate. He reported as well on other, unrelated, prospective purchases of minority stock interests in subsidiaries and affiliates of the company. As to the subsidiary shares held by the estate, he explained that Joel's terms would be the purchase price at the public auction plus an allocable portion of the litigation expenses leading up to the auction (C.K. Dep. 11-13, 15; J.A. 28, 30, 32). He recommended acceptance of those terms so long as the total price to Kay did not exceed the book value of the shares (C.K. Dep. 38; J.A. 55). The minutes of the meeting (Dep. Ex. 1; J.A. 139) reflect that C.D. Kaufmann was authorized by the board to "negotiate for the purchase of such minority interests as he deems desirable and advisable on such terms and conditions as, in his opinion, might be advantageous to this company." That resolution conferred on C.D. Kaufmann authority to negotiate with persons, including Joel, concerning purchase of these minority interests but not to make any agreement binding on Kay without approval of the board (C.K. Dep. 37-39; J.A. 54-55). We note here that in 1966 Kay's board consisted of ten persons, three of whom were neither employees nor officers of the company.[16] All the inside

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[15] Affidavit of Simon Hirshman, para. 3; J.A. 178.

[16] The three outside directors were Dr. Reavis Cox, a professor at the Wharton School of Finance; Mr. Barlett Pinkham, an associate of Allen & Company in New York; and Mr. Harry A. Watkins, a vice-president of the Bankers Trust Company. Cox and Watkins were elected at the board meeting on January 25, 1966.

directors owned substantial amounts of Kay stock.[17] The board was generally familiar with the litigation over Robert's estate (Affidavit of Joel S. Kaufmann, para. 2; J. A. 173; C.K. Dep. 15, 27; J.A. 32, 44). All members were present at the meeting on January 25, 1966.

Following the board meeting in January and before the public auction in June there were further discussions about the subsidiary shares between Joel and C.D. Kaufmann, but they left the situation essentially the same—that is, C.D. Kaufmann would recommend to the board the acquisition by Kay, on Joel's terms subject to a book value ceiling, of any subsidiary shares Joel might purchase at the public auction (C.K. Dep. 44-45; J.A. 61-62). The status of the negotiations when the auction occurred was described by Joel as follows:

> "At the time that I purchased the shares, I had no agreement or understanding with Kay that Kay would buy the shares from me, except that I had told C.D. Kaufmann that I would be willing to sell the shares to Kay at the price I paid at the sale plus the allocable share of my expenses in the litigation which resulted in the sale, and C.D. Kaufmann had told me that he would recommend to Kay's board of directors that Kay acquire the shares in its subsidiary and affiliated companies from me on this basis, so long as the price of the shares did not exceed book value. I had no certainty prior to the July 1, 1966 vote by the board of directors that the other directors would accept this recommendation, and I did not expect C.D. Kaufmann to vote on the recommendation, as indeed he did not." (Affidavit of Joel S. Kaufmann, para. 5; J.A. 174).

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[17]See Notice of Annual Meeting of Stockholders, September 28, 1966. (Dep. Ex. 6 at 4).

As already noted (page 7, *supra*), the public auction took place on June 7, 1966, and the subsidiary and non-subsidiary shares were sold to Joel as the only bidder, Weiss having been unable to obtain financing of his own or interest other bidders.

Sale of the Subsidiary Shares by Joel to Kay

Shortly before a meeting of Kay's board of directors scheduled to take place on July 1, 1966, C.D. Kaufmann appointed a committee to determine Joel's cost in the litigation leading up to the public auction and the proportion of those costs allocable to the subsidiary shares purchased by Joel at that auction. The committee consisted of an attorney under retainer to the company, Kay's comptroller, and another certified public accountant employed by Kay (C.K. Dep. 48-51; J.A. 65-68). The committee gave its oral report at the July 1 meeting, with all directors but one in attendance (C.K. Dep. 51; J.A. 68). The minutes of the meeting state:

> "It was reported that Joel S. Kaufmann, member of the Board, had recently purchased, at Public Sale ordered by the Surrogate's Court, New York County, New York in connection with the Administration of the Estate of Robert D. Kaufmann, Deceased minority interests in 39 of the company's subsidiary corporations, in which corporations, Kay Jewelry Stores, Inc. owns more than 80% of the outstanding shares in each of said subsidiary corporations, and that Joel S. Kaufmann offered to resell same to Kay Jewelry Stores, Inc. for the purchase price and the cost of acquisition. Whereupon, Joel S. Kaufmann left the room. An extended discussion ensued as to the advisability of this purchase, with a report prepared by Messrs. James S. Stoner, Attorney, Donald E. Hudson, CPA, and Jack Rihtarchik, CPA on the advisability of the purchase."
>
> "Whereupon, on motion duly made, seconded, and passed, with C.D. Kaufmann, Joel S. Kaufmann,

> and Donald J. Kaufmann abstaining from voting, the Board approved the purchase and the officers of the corporation were authorized and directed to purchase said shares of stock of the subsidiary corporations of Kay Jewelry Stores, Inc. from Joel S. Kaufmann at an aggregate sum not to exceed $411,000, the exact amount to be determined upon audit and to be based on the cost of said shares to Joel S. Kaufmann, including all of the costs incurred by him in acquiring said shares." (Dep. Ex. 2; J.A. 140).

Thus, neither Joel nor C.D. Kaufmann voted on the question of Kay's purchase of the subsidiary shares, and Joel was not even present at this meeting when the matter was discussed.

Following the annual Kay stockholders' meeting on September 28, 1966, the board of directors held its regular annual meeting.[18] All members of the board other than Mr. Rudolph were present. Also in attendance was the committee that had been appointed to determine the cost of the securities to be acquired from Joel. The committee's report submitted at the meeting (Dep. Ex. 4; J.A. 142-145) found that the book value of the stocks in the 39 subsidiaries and 3 affiliated companies being offered to the corporation (the subsidiary shares) was $490,420.67. The purchase price of these shares at the public auction was found to be $205,330.03, or 68.6 percent of the cost of all of the securities acquired by Joel at the auction. The committee found that Joel's total expenses in the litigation leading up to the sale were $284,838.28. It therefore added 68.8 percent of this figure, or $195,399.06, to the auction price of the subsidiary shares, and reached a total cost to Kay of

[18]Management's proxy statement for the meeting advised the stockholders of the action that had been taken at the July 1 board meeting. (Dep. Ex. 6 at 4.) No objection was raised.

$400,729.09, some 82 percent of (or $90,000 less than) book value.[19] As a result of subsequent adjustments, this figure was later reduced to a final price of $397,200.29 (Dep. Ex. 5; J.A. 146). The board ratified its previous action authorizing Kay to acquire the shares.[20]

On August 30, 1967, counsel for Weiss, the only Kay shareholder to object to the transaction, wrote to the directors asserting the liability of Joel Kaufmann and the other directors as a result of the events described. On September 9, 1968, this lawsuit was filed.

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[19]The minutes of the annual meeting state:

> "The President reported that, in accordance with the representation contained in the Proxy Statement, the Board of Directors on July 1, 1966 authorized the acquisition by the company of certain minority shares in thirty-nine (39) of the company's subsidiary corporations from Joel S. Kaufmann, Treasurer of the company, who had acquired such shares of stock at public sale ordered by the Surrogate's Court, New York County, New York, in connection with the Administration of the Estate of Robert D. Kaufmann, Deceased. The company owns more than eighty per cent of the outstanding shares in each of the said subsidiary corporations, and on February 28, 1966, the aggregate book value of the shares to be acquired by the company was $469,653.00. The Board of Directors authorized the acquisition of said shares of stock at an aggregate sum not to exceed $411,000.00, the exact amount to be determined upon audit and to be the cost of said shares to Joel S. Kaufmann, including all of the costs incurred by him in acquiring said shares. The acquisition by the company of said shares from Joel S. Kaufmann has not been completed as of this date.
>
> "Thereupon, the President called upon Donald Hudson, who presented to the Board a written report, which was handed to each member of the Board, dated September 28, 1966, signed by him, J.F. Rihtarchik, and James R. Stoner, being the special committee appointed by the Board to report on this matter, which set forth in detail the stocks involved and the costs of acquisition, which totalled $400,729.09. Whereupon, on motion duly made, seconded and unanimously passed, the Board ratified and reconfirmed its previous action authorizing this corporation to acquire said subsidiary stocks." (Dep. Ex. 3; J.A. 141-142).

[20]Dep. Ex. 3, at 2; J.A. 142.

ARGUMENT

The District Court granted summary judgment to Weiss on the ground that the acquisition of the subsidiary shares by Joel and the subsequent resale of those shares by Joel to Kay was a "scheme" concocted by appellants to reimburse Joel for litigation expenses unrelated to the corporate business of Kay. Our central contention is that the existence of a "scheme" was a factual issue requiring for its resolution a factual determination of the motives and purposes of both Joel and Kay, and that as to these matters the evidence created genuine disputes. The materiality of the "scheme" issue is obvious—indeed the District Court considered it dispositive. Our position is therefore that under settled principles precluding summary judgment where a genuine dispute exists as to a material fact, the action of the District Court cannot be sustained.

1. Introduction

We mention and then put aside at the outset certain issues that, as we understand it, are not involved in this case. First of all, as plaintiff expressly conceded at oral argument,[21] and as the District Court's findings of fact and conclusions of law make clear,[22] the doctrine of corporate opportunity is not involved. That doctrine, as it has developed

[21] Tr. 1, 7, 46; J.A. 193.

[22] Initially (see Tr. 1, 6; J.A. 183) the District Court viewed the case as one that did involved the corporate opportunity doctrine, but his findings of fact and conclusions of law (Tr. 47; J.A. 184)—as we understand them—put the decision on the ground that Kay's funds were expended without any valid corporate purpose but rather for the illicit purpose of enriching Joel. Disposition of the case on this ground—lack of valid corporate purpose—is of course entirely inconsistent with a finding that acquisition of the subsidiary shares was a corporate opportunity, since valid and perhaps essential corporate purposes are required to create that kind of opportunity.

under Delaware law,[23] prohibits a corporate officer or director from appropriating as his own a business opportunity that falls into the corporation's ordinary sphere of interest and that the corporation would be able and willing to undertake.[24] Here, of course, it is undisputed that the opportunity to bid for the subsidiary shares at the public auction was one which, with full and early knowledge of that opportunity, the corporation was unwilling to take. Indeed, plaintiff contended at oral argument in the District Court (Tr. 16) that, far from being a business opportunity to which Kay had an exclusive right as against its officers and directors, acquisition of the subsidiary shares served "no valid corporate purpose" at all since Kay already owned controlling stock interests in the subsidiary companies. Plaintiff's correct concession on the corporate opportunity point means, in effect, that apart from the assertion that it was part of a "scheme" to reimburse Joel for private litigation expenses, there is not anything even arguably improper about Joel's acquisition of the subsidiary shares at the public auction.[25] That is, if the opportunity to bid on the subsidiary shares did not "belong" to Kay, it follows

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[23] Delaware law governs the fiduciary obligations of a director of a Delaware corporation. See *Perlman v. Feldmann*, 219 F.2d 173, 175 (2d Cir. 1955), *cert. denied*, 349 U.S. 952; *Mayflower Hotel Stockholders Protective Comm. v. Mayflower Hoted Corp.*, 89 U.S. App.D.C. 171, 173-174, 193 F.2d 666, 668-669 (1951); *Air Traffic & Service Corp. v. Fay*, 90 U.S. App. D.C. 319, 321, 196 F.2d 40, 42 (1952).

[24] The three leading Delaware cases on the corporate opportunity doctrine are *Equity Corp. v. Milton*, 221 A.2d 494 (Del. Sup. Ct. 1966), *Johnson v. Greene*, 121 A.2d 919 (Del. Sup. Ct. 1956), and *Guth v. Loft, Inc.*, 5 A.2d 503 (Del. Sup. Ct. 1939).

[25] Had the need to discuss the corporate opportunity point on its merits not been removed by plaintiff's concession, we would be prepared to show—obviously in greater detail than we do here—that in addition to Kay's unwillingness to bid at the auction despite the clear availability of that course of action, the circumstances surrounding the auction failed to satisfy at least three other tests that the Delaware courts have applied in determining whether a corporate opportunity exists. [continued]

that Joel was free to bid in his own right and purchase the shares on the best terms that the bidding made possible.

A closely related and second issue that is not in the case is Joel's right to sell and Kay's right to buy the subsidiary shares. Weiss has never contended that any transaction between Joel and the corporation, on any terms whatsoever,

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(a) *Source of Opportunity*. One factor consistently regarded as important is whether the opportunity came to the officer in his corporate or his individual capacity. *Johnson v. Greene, supra*. Weiss conceded in the District Court that the opportunity to purchase the shares "resulted not from any action of Kay, but largely from acts of Joel Kaufmann in his individual capacity." Plaintiff's Reply To Memoranda Opposing Summary Judgment, at 5, n. 4. In *Equity Corp. v. Milton, supra*, the Supreme Court of Delaware in holding that the opportunity to acquire certain stock was not a "corporate opportunity" belonging to Equity, relied heavily upon the fact that the stock in question became available only because it had previously been sold to a third party by Milton, himself. Thus, the court held, "whatever opportunity existed was of Milton's own making," and therefore his. 221 A.2d, at 499. Similarly here, Weiss concedes that the opportunity to purchase the shares at the Surrogate's sale came about as a direct result of the litigation undertaken by Joel. Whatever opportunity existed was of Joel's own making and was therefore his to exercise.

(b) *Use of Corporate Assets*. A second important consideration is whether the director used the assets or credit of his company in acquiring or exploiting the opportunity. Compare *Guth v. Loft, supra*, and *Paulman v. Kritzer*, 219 N.E. 2d 541 (Ill. App. 1966) (applying Delaware law), with *DuPont v. DuPont*, 256 Fed. 129, 133-141 (3d Cir. 1919). Again, Weiss concedes that "Joel used his own funds, not Kay's, in purchasing the securities." Plaintiff's Reply to Memoranda Opposing Summary Judgment, at 5, n. 4.

(c) *Secrecy or Good Faith*. Another factor is whether the defendant acted secretly, or whether he fully informed his corporation of the actions that he propsoed to take. Compare *Guth v. Loft, supra*, and *Dolese Bros. Co. v. Brown*, 157 A.2d 784 (Del. Sup. Ct. 1960), in which the secret dealings of the defendant directors were condemned, with *Johnston v. Greene, supra*, in which the defendant director who was held not liable had discussed the matter with his co-directors. Again, Weiss concedes that Joel made "full disclosure to Kay's directors." Plaintiff's Reply To Memoranda Opposing Summary Judgment, at 5, n. 4.

was barred. He has not suggested, for example, that any fiduciary obligations would have been breached if the corporation, had bought the subsidiary shares from Joel at the same price that Joel paid for them at the public auction. On the contrary, he has contended that the sale to Kay was improper only by reason of the $192,000 difference between what the corporation paid Joel and what Joel paid at the auction. And the issue raised by this contention is not whether Joel made or was entitled to make a profit on the transaction—because if he validly acquired the subsidiary shares he was clearly entitled to resell them at a profit—[26] but rather whether the $192,000 price differential conclusively establishes that the transactions were a "scheme" to reimburse Joel for private litigation expenses.[27]

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[26]Plaintiff argued in the District Court (Tr. 5) that a corporate director breaches his fiduciary obligations whenever he buys property with the purpose of reselling it to the corporation at a profit. While summary judgment was not granted on this ground, the District Court having failed to even mention it in his oral opinion, we note that there is no such principle as the one urged by plaintiff on the District Court. A director who validly acquires property may "determine the price which will induce him to sell to the corporation" and is thus free to realize whatever profit he fairly can. *New York Trust Co. v. American Realty Co.*, 244 N.Y. 209, 155 N.E. 102, 105 (1926). And see *Flint River Pecan Co. v. Fry*, 29 F.2d 457, 459 (5th Cir. 1929); *Bliss Petroleum Co. v. McNally*, 254 Mich. 569, 237 N.W. 53 (1931). 3 *Fletcher, Cyclopedia of Corporations*, § 884, at 293. A prohibition against resale of property to a corporation exists only where the director seized a corporate opportunity when he purchased the property in the first instance, see *New York Trust Co. v. American Realty*, *supra*, and Weiss concedes that is not the case here. Moreover, even if there is a broader prohibition, Joel denied both that he acquired the subsidiary shares for the purpose of resale to Kay (see page 8, *supra*), citing several other compelling and credible reasons for his purchase, and that he realized a profit on the resale, since he considered the litigation expenses part of his cost. So there would have been disputes requiring a trial on this theory of liability, even if the theory itself was somehow tenable.

[27]We note also that where a director is required to reimburse his corporation for illegal profits that he realized by appropriating a corporate opportunity, the measure of liability is the director's net gain

Third, the case does not involve any issue of concealment or deception on the part of Joel. It is undisputed that Joel made clear to C. D. Kaufmann both his intention to bid at the auction—higher than the minimum price if necessary—and the terms on which he would be willing to resell the subsidiary shares to Kay, and that C. D. Kaufmann reported these matters accurately to Kay's board of directors. It is also undisputed that all relevant facts concerning the acquisition of the subsidiary shares from Joel were before Kay's board when all directors other than Joel and his cousins C. D. Kaufmann and Donald Kaufmann voted to approve the transaction at the meeting on July 1, 1966 and when the board ratified that decision at the meeting on September 28, 1966.

Fourth, what was said in the discussions between Joel and C. D. Kaufmann that took place prior to the public auction is not an issue in the case. The undisputed facts about the discussions are that Joel said he would sell the subsidiary shares to Kay at the auction price plus the allocable portion of his litigation expenses, and C. D. Kaufmann said he would recommend the transaction to Kay's board on these terms so long as the total price did not exceed the book value of the shares. The conclusion from these facts urged by Weiss on the District Court was that the parties reached an "agreement" or "understanding" that Kay would purchase the subsidiary shares from Joel,[28] while we denied—as Joel denied in his affidavit [29]—that any "agreement" or "understanding"

after deducting his costs attributable to production of the profits. *Central R.R. Signal Co. v. Longden*, 194 F.2d 310, 324 (7th Cir. 1952). Thus even if the $192,000 price differential is viewed as profit to Joel, and even if that profit is held to have been illegally obtained, there still would be no net gain and accordingly no liability once account is taken of the litigation expenses incurred by Joel in bringing about the public auction at which the subsidiary shares were sold.

[28]Plaintiff's Reply to Memoranda Opposing Summary Judgment, page 3; and see Tr. 45-46.

[29]Affidavit of Joel S. Kaufmann, para. 5; J.A. 174-175.

of this kind was reached. If for present purposes it made any difference whether prior to Joel's acquisition of the subsidiary shares an "agreement" was reached that Kay would purchase those shares, we would of course contend that this was a disputed question of material fact. However, in the context of this appeal, the issue is whether the discussions between Joel and C. D. Kaufmann were part of a "scheme" to reimburse Joel for private litigation expenses, and that issue—which requires the resolution of factual disputes about the motives and purposes of the parties—remains the same whether or not the conclusory labels "agreement" or "understanding" are applied to the discussions. That is, if as we contend Joel had a perfect right to purchase the subsidiary shares at the public auction and Kay had a perfect right in the exercise of its best business judgment to purchase the same shares from Joel, it can make no difference whether these transactions were carried out pursuant to an "agreement."

So far as the total price paid by Kay for the subsidiary shares is concerned, Weiss argued below that it was "excessive" in relation to fair market value, but the District Court found that the market value of the shares was a disputed material fact ruling out summary judgment on this theory of liability. [30] So the actual market value of the subsidiary shares is not an issue on this appeal.

Finally, domination of Kay's board of directors by Joel or C. D. Kaufmann or both is not an issue here. Weiss has not alleged, and there is nothing in the record to suggest, that the members of the board, including three outside directors, exercised anything but their own independent judgment in connection with the subsidiary share transaction.

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[30] Tr. 9. We note in this regard that the Surrogate was careful to distinguish the minimum price that he authorized the temporary administrator to accept for the estate's shares at the approved auction from the actual market value of those shares. See page 6, *supra*.

In suggesting the issued that we understand are not involved in this case, it seems appropriate to us to note that the theory of Weiss's case changed sharply when, a few days before the oral argument and more than a month after the defendants had submitted their responses to the motion for summary judgment, he filed his reply memorandum.[31] He raised several issues for the first time in that memorandum, including the contention on which the District Court's judgment appears to be based—namely, the contention that Kay had no purpose in acquiring the subsidiary shares other than the illicit purpose of enriching Joel. On the day before the hearing we then filed a supplemental statement of genuine issues,[32] pointing out the issues raised for the first time by Weiss. However, there was no time to prepare affidavits presenting evidence on those issues.

Had we been afforded time to present affidavits on the question of corporate purpose, the record would reflect even more clearly than it already does that Kay had a legitimate business interest in acquiring the subsidiary shares from Joel. In this connection we would have shown that Kay purchased minority stock holdings in its subsidiary companies in three other separate transactions that occurred within a few months of the challenged transaction with Joel.[33]

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[31] Plaintiff's Reply to Memoranda Opposing Summary Judgment.

[32] Defendants' Supplemental Statement of Genuine Issues, J.A. 180-181.

[33] At oral argument (Tr. 41), counsel for Joel Kaufmann represented that evidence of these transactions would be presented at trial.

2. **The Motives And Purposes Of Joel And Kay In The Purchase And Resale Of The Subsidiary Shares Were Factual Issues As To Which There Were Genuine Disputes.**

Our argument quite simply is this: Kay, through its president, C. D. Kaufmann, has given reasons for its judgment that the best interests of the corporation were served by acquiring from Joel the subsidiary shares that previously had been offered at public auction for an opening minimum price that was some $192,000 less than the ultimate price paid by the corporation. The reasons were, as to the acquisition itself, that Kay wanted protection against the possibility of eventual ownership by outsiders and was generally interested in acquiring minority stock interests of its subsidiaries; and as to the decision to buy from Joel but not to bid at the auction, that its own participation in the auction might have escalated the bidding dramatically—and certainly would have escalated it to some extent in view of Joel's declared intentions—and that its ability to invest in the securities of companies other than its own subsidiaries, some of which were to be offered at the auction together with the subsidiary shares, was limited by an outstanding loan agreement. For his part Joel has stated that he intended to bid on the estate's shares at the auction—well beyond the fixed minimum price if necessary—whether or not he thought he would be able to resell the subsidiary shares to Kay.[34]

The District Court, as we have noted, found as a matter of fact that the purchase and resale transactions constituted a reimbursement "scheme." Reasonable jurors might well have reached another conclusion. Had they believed the statements of Joel and Kay—and those statements are surely

[34]Joel's intentions in this regard were corroborated by the facts that his sons were beneficiaries of the estate, giving him an obvious family interest in the proceeds of the auction, that he obtained a $500,000 line of credit to finance the purchase, and that he was worried about bidding competition from Weiss.

not inherently incredible—they would have found that Joel had valid personal reasons to buy the subsidiary shares at the auction, that Kay used its best business judgment in deciding that the corporation's interest would be served by purchasing the shares from Joel, and that accordingly there was no "scheme" and no liability. The questions presented here were ones of subjective intentions—not what was done by Joel and Kay but why it was done—and as to questions of this kind two distinct lines of authority, which we now discuss, converge to make summary judgment especially inappropriate.

3. Summary Judgment Is Precluded Where Material Issues Exist As To Motive Or Intent.

It is settled that a case "where motive and intent play leading roles" may not be terminated by summary judgment. *White Motor Co. v. United States,* 372 U.S. 253, 259 (1963); *Poller v. Columbia Broadcasting System,* 368 U.S. 464, 473 (1962). And see *Dewey v. Clark,* 86 U.S. App. D.C. 137, 180 F.2d 766 (1950). This brake on judicial action is a specific application of the broader principles that an inference of fact—at least where, as here, two reasonable ones are available and one is favorable to each litigant—may not be drawn and an issue of credibility may not be resolved on a motion for summary judgment. *United States v. Diebold, Inc.,* 369 U.S. 654, 655 (1962); *Cross v. United States,* 336 F.2d 431, 433 (2d Cir. 1964); *Empire Electronics Co. v. United States,* 311 F.2d 175, 180 (2d Cir. 1962); *Bragen v. Hudson County News Co.,* 278 F.2d 615, 618 (3rd Cir. 1960); *Alvado v. General Motors Corp.,* 229 F.2d 408, 411-412 (2d Cir. 1955). Particularly sharp warnings against the use of summary procedures have been issued in derivative actions involving—as this case does—breaches of fiduciary obligations by corporate officers or directors. *Schoenbaum v. Firstbrook*, 405 F.2d 215 (2d Cir. 1968) (en banc), cert. denied, 395 U.S. 906 (1969); *Subine v. Goldsmith*, 224 F.2d

753 (2d Cir. 1955), *cert. denied*, 350 U.S. 833; *Fogelson v. American Woolen Co.*, 170 F.2d 660 (2d Cir. 1948); *United Industrial Corp. v. Nuclear Corp. of America*, 43 F.R.D. 30 (S.D.N.Y. 1967); *List v. Fashion Park, Inc.*, 222 F. Supp. 798 (S.D.N.Y. 1963); *Breswick & Co. v. Briggs*, 135 F. Supp. 397 (S.D.N.Y. 1955).

In *Schoenbaum v. Firstbrook, supra*, a derivative suit was brought on behalf of Banff Oil Co. in which plaintiffs discharged that Banff's directors, knowing of certain imminent oil discoveries by the company, had sold two large blocks of treasury shares to certain parties at "vastly inadequate" prices, pursuant to a conspiracy to enrich their "affiliates, business associates and friends" at Banff's expense. In reversing the District Court's order granting summary judgment for the defendants, the Court of Appeals, after criticizing the granting of summary judgment in derivative suits generally, added:

> "Indeed in many stockholder's derivative actions there will be issues as to knowledge, intent and motive which require a full trial with an opportunity to observe the demeanor of the witnesses, and to conduct cross-examination in open court. In such cases summary judgment cannot be granted even after discovery has been had." 405 F.2d at 218.

The existence of the conspiracy alleged in *Schoenbaum* presented the same kind of issue as the alleged existence of a "scheme" presents in this case.

In *Fogelson v. American Woolen Co., supra*, the corporation had promulgated a retirement plan, six months prior to the retirement eligibility date of the company president, under which the president, upon retirement, would receive \$54,220 a year for life. The next highest pension for any corporate employee was \$7,000. In a derivative suit, plaintiff shareholders charged that the real purpose of the retirement plan was to favor the president with a large and sure pension. The defendant directors asserted that the plan was

promulgated in the exercise of their valid business judgment. "Therefore," said the Court of Appeals in reversing summary judgment for the defendants, "a triable issue of fact exists as to whether the directors did exercise their honest business judgment or were motivated by the alleged purpose of favoring the president." 170 F.2d at 662. The same kind of triable issue exists in this case, as we have already shown.

Breswick v. Briggs, supra, involved a proxy fight for control of the New York Central. It was undisputed that Central's parent (Alleghany) loaned $7.5 million without security to the Murchison group, whose members were close associates of the existing management, to help the group to purchase 800,000 Central shares, and that Alleghany also committed itself to repurchase 300,000 of these shares from the Murchisons at a later date. In addition, the management group bought substantial blocks of Central shares for themselves without making similar purchases for Alleghany. The Murchisons voted their stock for the existing management, which was retained in control. Plaintiffs contended that the Alleghany management acted in concert with the Murchisons, causing Alleghany to spend and lend its funds for their personal benefit. Plaintiffs also argued that in purchasing large blocks of Central shares for themselves, the defendants had appropriated a corporate opportunity of Alleghany. In an affidavit filed by the defendants, Alleghany's president denied that he acted in concert with the Murchisons and claimed that the purchase of Central stock was suitable for himself personally but unduly speculative for Alleghany, and that if Alleghany had entered the market to purchase more [entral stock, it would have unduly run up the price of the stock. The court observed that the president's affidavit

> ". . . does not explain why under these circumstances it was prudent for Alleghany to commit itself to purchase 300,000 shares of New York Central stock at the option of Murchison and Richardson. Similarly, he does not explain why the fear of

> raising the price of the stock which kept Alleghany out of the market did not also prevent Kirby and himself from acquiring their own large personal holdings. Nor does he dispel the possibility of a conflict in this regard between his personal venture and that of Alleghany." 135 F. Supp. at 402.

However, the court denied the plaintiffs' motion for summary judgment:

> "The convincing or unconvincing quality of this affidavit is not a proper matter for consideration. It is enough that issues of fact are raised. Although many of the alleged transactions are not susceptible to dispute, issues of fact as to the reasons for their occurrence and the relationship between the individual defendants preclude summary judgment at this time. It is not enough that plaintiffs might establish a prima facie case by record transactions. Defendants are entitled to a full opportunity to present their defense and they cannot be compelled to meet these issues by affidavits." 135 F. Supp. at 402.

Again the parallel to this case is striking. Here the District Court may not have been convinced that Kay had good reason to buy the subsidiary shares from Joel at a price that was some $192,000 greater than the minimum price for which the same shares were offered at a public auction at which the corporation itself did not bid. The District Court may have considered that C. D. Kaufmann was unwarranted in his belief that Kay's own participation in the bidding might have greatly escalated the auction price for the subsidiary shares. But plainly these were issues for a jury and not for a summary disposition based on affidavits.

4. The Business Judgment Rule Precluded Summary Judgment

The allegations made by Weiss and accepted by the District Court that the purchase and resale of the subsidiary shares was a "scheme" to reimburse Joel for private litigation expenses unrelated to Kay's corporate business were not

only disputed as a matter of fact. They were presumptively wrong as a matter of law. There is a presumption under Delaware law "that the directors of a corporation are actuated in their conduct of the business of the corporation by a bona fide regard for the interests of the corporation." *Karasik v. Pacific Eastern Corp.*, 180 Atl. 604, 607 (Del. Ch. 1935). Accord, *Isaacs v. Forer*, 159 A.2d 295, 297 (Del. Ch. 1960); *Kors v. Carey*, 158 A.2d 136, 142 (Del. Ch. 1960); *Gropper v. North Central Texas Oil Company*, 114 A.2d 231 (Del. Ch. 1955); *Hartford Accident and Indemnity Co. v. Dickey Clay Mfg. Co.*, 21 A.2d 178 (Del. Ch. 1941). The presumption is a rebuttable one, but it is not enough to show that the business judgment of the directors may have been faulty or even harmful to the corporation. There must be a showing of bad faith, fraud or gross negligence—a standard that the impermissible inferences drawn by Weiss surely don't satisfy—before the presumption will fall. *Wyles v. Campbell*, 77 F. Supp. 343, 349 (D. Del. 1948), and authorities cited therein. See also *Hoffman v. Dan*, 205 A.2d 345, 350 (Del. Sup. Ct. 1964); *Lieberman v. Becker*, 155 A.2d 596, 600 (Del. Sup. Ct. 1959).

The business judgment rule applies with special force where, although some of the corporate directors have a personal interest in a corporate transaction, there is no evidence of domination by those directors and the disinterested directors who approved the transaction are also shareholders of the corporation. In these circumstances, the Delaware courts have pointed out, if the disinterested directors made a bad bargain, "they injured themselves." *Lipkin v. Jacoby*, 202 A.2d 572, 576 (Del. Ch. 1964). The Courts will not inquire further into the transaction where "there has been no showing of any plausible motive which would cause such officers [the disinterested ones] and principal stockholders to commit acts of self-injury." *Gropper v. North Central Texas Oil Co.*, 114 A.2d 231, 235 (Del. Ch. 1955).

In *Lipkin,* the plaintiff charged the directors of Basic Corporation with breach of fiduciary duty in causing it to contract for the purchase of an 85 percent interest in a piece of land belonging to a syndicate to which two members of Basic's board belonged, while the syndicate was retaining the remaining 15 percent interest at a disproportionately low valuation. Plaintiff did not claim that this 15 percent was a corporate opportunity of Basic, but did insist that the two directors should account for personal profits made at the expense of Basic when the property was subsequently resold. In rejecting the plaintiff's claim, the court pointed out that, prior to the joint purchase, the individual directors had made a substantial down payment and taken on the commitment to pay the full purchase price for the property. Under these circumstances, it was entirely permissible for these directors to retain the substantial profit they earned. Moreover, the interests of the two directors were fully revealed to the disinterested directors of Basic who voted for the transaction, and the company itself gained approximately $50,000 when the property was finally resold. And, the court added, "plaintiff has failed to establish any motive for the corporate directors [other than the interested directors] to vote against their substantial interests as shareholders of Basic." 202 A.2d at 575.

The controlling facts in the present case are, we contend, virtually identical. Here, as in *Lipkin,* no claim of corporate opportunity is made. As in *Lipkin,* the interested director (here Joel) had invested substantial amounts in bringing about the opportunity (here the chance to bid at the public auction), and had validly acquired an interest in the property involved (here the subsidiary shares) through channels unrelated to his official position in the company. Here as in *Lipkin,* the transaction was fully revealed to the company's board of directors, and there was no evidence that the board was dominated by the interested directors. In both cases disinterested board members were also substantial shareholders, and if the board "made a bad bargain, they injured themselves."

CONCLUSION

We have not found, and Weiss has never cited, a single stockholder's derivative action in which summary judgment was awarded to the plaintiff. For the reasons stated above, this should not be the first such case. The judgment of the District Court should be reversed and the case remanded for a trial.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,443

WALTER A. WEISS

v.

KAY JEWELRY STORES, INC., et al.,
CECIL D. KAUFMANN AND SIMON HIRSHMAN,

Appellants.

No. 24,444

WALTER A. WEISS

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KAY JEWELRY STORES, INC., et al.,
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Appellant.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

BRIEF FOR APPELLEE

ISSUES PRESENTED FOR REVIEW*

1. Whether, in a derivative stockholders' suit, summary judgment against three officers and directors of a corporation is sustainable because the record shows, without a gen-

*This case has not been previously before this Court.

uine issue of material fact, that one of them, assisted by the others, purchased property for the purpose of reselling it to the corporation at a profit to himself and did so.

2. Whether the summary judgment is sustainable because the record shows without a genuine issue of material fact that the property was sold to the corporation at a price far in excess of its worth.

3. Whether the summary judgment is sustainable because the record shows without a genuine issue of fact that the director's purchase and resale was pursuant to a scheme of the three directors to reimburse the first director for personal expenses incurred by him for matters not connected with the corporate business.

4. Whether the two directors who did not profit from the transaction are liable in the amount of the illicit profit.

STATEMENT OF THE CASE

Proceedings Below

This is a stockholder's derivative action. The appellee, Walter A. Weiss, a stockholder[1] of Kay Jewelry Stores, Inc. (hereafter Kay), a Delaware corporation (J.A. 178), sued the corporation and its directors in the District Court. The complaint alleged that the individual directors had breached their fiduciary obligations in connection with a purchase by Kay from Joel Kaufmann of stock in certain of Kay's subsidiary corporations (J.A. 5-8). The non-resident directors could not be served and were dropped from the litigation (J.A. 1), leaving the three appellants as co-defendants with Kay. These are Cecil D. Kaufmann, president of Kay, his cousin, Joel S. Kaufmann, treasurer of Kay, and Simon Hirshman, secretary and general counsel of Kay (J.A. 5, 9, 13-14). Weiss took the depositions of Cecil and Joel Kaufmann and

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[1] Since Weiss' capacity to sue is conceded, his affidavit establishing his stock ownership was not printed in the Appendix (see J.A. 170).

therein introduced various documents identified by them (J.A. 18-162). The only other evidentiary material in the record consists of Weiss' affidavit establishing his stock ownership, two Surrogate's Court documents identified on Weiss' request for admission of their genuineness (J.A. 163, 169), Kay's answer to Weiss' interrogatory requesting the dates of certain payments to Joel Kaufmann (J.A. 179), and affidavits of Joel Kaufmann and Hirshman with documents attached (J.A. 173-78).

Weiss moved for summary judgment (J.A. 170). After hearing argument, District Judge Hart ruled (J.A. 184):

> "While on some of the Plaintiff's theories in this case, there may be disputes, genuine disputes of issues of fact, the Court holds that there is no dispute, of genuine dispute of any issue of fact involving this question, and that is that the purchase by Joel S. Kaufman of the stock in question and its resale to Kay's was a scheme devised by the Defendants to reimburse Joel S. Kaufman for his personal expenses in a will contest unconnected with the corporate business of the case; that such on the part of the Defendants was a gross violation of their duties to the corporation and to the stockholders, and that the corporation is entitled to recover the excess price, and I'll grant summary judgment."

Judgment was entered that Kay recover of appellants, jointly and severally, the sum of $191,870.26 (equal to Joel's illicit profit in the challenged transaction) plus interest from the dates the profit was realized by payments from Kay to Joel (J.A. 185). The individual defendants appealed (J.A. 186).

Facts

Robert D. Kaufmann, brother of appellant Joel Kaufmann and cousin of appellant Cecil Kaufmann, died in April 1959. His will left virtually the entire estate, valued slightly below $1,000,000, to his friend Weiss, the appellee in this case. An immediately preceding will left half the

residuary estate to Joel's children and half to Weiss. The estate was probated in the Surrogate's Court for New York County. (J.A. 89-91); *In re Kaufmann's Will*, 247 N.Y. Supp. 2d 664 (A.D. 1964).[2]

Joel Kaufmann instituted on behalf of his children and brother Aron a contest of Robert's last will. After protracted litigation, the will was denied probate on the ground that it had been obtained by "undue influence" by Weiss. *In re Kaufmann's Will, supra.* Joel then instituted a contest of the penultimate will, with the object of validating a still earlier will which left the residuary estate to Joel's children and Aron. The second contest was pending at the time of Joel's deposition in this case. (J.A. 90).

The Surrogate eventually allowed payment out of the estate of $100,000 for litigation expenses of the successful will contest (J.A. 162). Joel's will litigation expenses, however, were close to $400,000 (J.A. 162).[3]

On May 13, 1965, the temporary administrator of Robert Kaufmann's estate petitioned the Surrogate's Court for an order directing a public sale of securities held by the estate. These securities included minority holdings of stock in 42 subsidiary corporations of Kay, as well as shares in other corporations. (J.A. 163-68, 142-43). After taking evidence on the value of the securities, the Surrogate issued on April 29, 1966, an order and opinion directing that the securities be sold at public auction and fixing upset prices totalling $297,388.03 (J.A. 148-55, 169). The aggregate of the upset prices for the Kay subsidiaries' stock was $205,330.03 (J.A. 6, 9, 14).

The Surrogate valued the securities for upset prices according to three formulas. A flat dollar price was set for preferred stock, evidently representing par or redemption

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[2] A copy of this opinion is in the record as an attachment to Joel Kaufmann's affidavit (See J.A. 173).

[3] The $290,000 figure in Joel's affidavit (J.A. 174) is obviously the amount of his expenses after deducting the payment by the estate.

value. Some of the common stock was valued on a 12 times annual earning basis, discounted by 16-2/3%. The rest of the common stock (evidently of corporations which were not realizing net earnings) was valued at 30% of book value. The last category included only Kay subsidiaries' stocks. The other two categories included both subsidiaries' stocks and stocks in the non-subsidiary corporations. (J.A. 169).

The deposition testimony shows that between May 13, 1965, and January 25, 1966, Joel Kaufmann had several conversations with Cecil and Hirshman regarding the securities in Robert's estate (J.A. 31-35, 56-58, 98-99). Joel first asked Cecil whether, if Joel bought these securities at auction, it would be possible for him to exchange the Kay subsidiaries' stock for stock in the parent corporation. Cecil doubted that this could be done because Kay's lawyers had previously said that such exchanges were impractical. Joel then asked Cecil's opinion as to whether Kay would buy the subsidiaries' stock from him if he acquired it from the estate. Cecil responded, "I don't see any reason why the company wouldn't want them because if they fell in other hands there could be a source of considerable difficulty in this number of corporations." (J.A. 36.)

In the conversations, Joel told Cecil and Hirshman of his firm determination to acquire the subsidiaries' stock by bidding at the auction and to keep it out of the hands of strangers. He also said that if there was competition in the bidding, he would bid up the price to where any buyer would have to pay for his expenses. (J.A. 35, 39, 49-50, 99-100).

Joel told Cecil that if Kay purchased the subsidiaries' stock from him, he would require his "true cost," this to include not only the price he would pay at the auction, but also so much of his will litigation expenses as was allocable to the subsidiaries' stock.[4] Cecil agreed to recom-

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[4]I.e., the total will litigation expenses were to be allocated between the subsidiaries' stock and the non-subsidiary stock held by Robert's estate.

mend to Kay's board of directors that Kay purchase the subsidiaries' stock from Joel at this "true cost," but not to exceed the book value ($490,420) of the subsidiaries' shares. (J.A. 36-38, 40-42, 55, 58.)

Cecil testified that he definitely considered it in Kay's interest to acquire the subsidiaries' stock (J.A. 40-41). However, he testified, he was opposed to Kay's bidding at the auction because that might attract competitive bidders (J.A. 45, 49-50). He did not know how the securities would be auctioned (J.A. 46-48), but he would not have had Kay bid at the auction even if the subsidiaries' stock were offered apart from the nonsubsidiary stock (J.A. 49).

On January 25, 1966, at a special meeting of Kay's board of directors, Cecil Kaufmann made the recommendation he had promised (J.A. 55). Cecil at that time had no idea of the amount of Joel's litigation expenses (J.A. 42-43). [redacted]). Hirshman and Joel Kaufmann also attended the meeting (J.A. 139). The answers to the complaint recite that the discussions at the meeting "contemplated that Joel S. Kaufmann would bid in [the subsidiaries'] shares at the auction, and that the securities so acquired would be purchased by the Company at a price measured by what Joel S. Kaufmann paid for the securities at the auction and a fair share of the expenses which had occurred in the litigation that resulted in the auction of such securities." (J.A. 10, 14-15.) In implementation of this contemplation, the board adopted a resolution authorizing Cecil to "negotiate for the purchase of such minority interests as he deems desirable and advisable on such terms and conditions as, in his opinion, might be advantageous to this company." (J.A. 139.)

At the same meeting, Cecil appointed an audit committee, consisting of two Kay employees and a Kay attorney, whose function it would be to compute the price of the contemplated purchase from Joel under the "true cost" formula[5] (J.A. 65-68).

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[5]Cecil testified that he appointed the audit committee at a meeting of the board of directors previous to the board meeting of July

Following the meeting and before the public auction, Cecil and Joel had further conversations along the same lines as before (J.A. 60-63). They testified in their depositions that prior to the auction they had an understanding that Kay would repurchase the stock from Joel. Cecil testified:

> "Q. Is it fair to say that it was your understanding prior to June, to this public auction of June 1966, that Joel Kaufman would bid for the shares and that if he bought them he was going to resell them to the company? A. Under the same terms and conditions as I stipulated." (J.A. 62.)
>
> "Q. It is also fair to say that your conversations with Joel manifested to you prior to this auction sale of June, 1966, that it was his understanding that the company would buy the securities from him if he bought them at the auction; of course on those same terms as already indicated. A. Correct." (J.A. 63.)

Joel testified:

> "Q. At the time you purchased the securities on June 7, did you have an understanding that you were going to sell the subsidiaries stock, that is subsidiaries of Kay Jewelry to the company? A. I think so—a tacit understanding." (J.A. 108.)

Joel and Hirshman attended the public auction, held on June 7, 1966 (J.A. 108). The securities were offered in three lots, grouped according to the method of the valuation for upset price purposes. Joel was the sole bidder and purchased the securities for the total of the upset prices set by the Surrogate (J.A. 157-58). As already seen, $205,330.03 of this total amount was for the subsidiaries' stock, the balance ($92,058) being for the non-subsidiary stock. At the

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1, 1966 (J.A. 65-66). There was no meeting of the board between January 25, 1966, when the subject first came up, and July 1, 1966, when the audit committee first reported to the board (J.A. 65-67).

time of the auction, Kay was a party to a loan agreement which limited its purchases of non-subsidiary shares to about $238,000 (J.A. 178).

Following the auction, but prior to July 1, 1966, Joel submitted to the audit committee incomplete information as to the amount of his will litigation expenses (J.A. 69-70, 91-96).

The first post-auction meeting of Kay's board of directors was held on July 1, 1966. Joel, Cecil and Hirshman attended. Joel left the room and the audit committee presented a report on the contemplated purchase of the subsidiaries' stock. The board adopted a resolution (Joel, Cecil and another Kaufmann abstaining from voting) approving the purchase of the subsidiaries' shares from Joel "at an aggregate sum not to exceed $411,000, the exact amount to be determined upon audit and to be based on the cost of said shares to Joel S. Kaufmann, including all of the costs incurred by him in acquiring said shares." (J.A. 140.)

The annual stockholders' meeting of Kay was held on September 28, 1966. The notice of the meeting, signed by Hirshman as Secretary, described the foregoing action of the Board of Directors, stating that the acquisition cost was "to be based on the cost of said shares to Joel S. Kaufmann, including all of the costs incurred by him in acquiring said shares." Nothing was said in the notice that Joel Kaufmann's acquisition costs were considered to include expenses he had incurred in the estate litigation. (J.A. 147.)

The board of directors also met on September 28, 1966, with Cecil, Joel and Hirshman in attendance. The audit committee submitted a detailed report that Joel's "costs of acquisition" of the subsidiaries' stock totalled $400,729.00, a figure it had reached by including the allocable share of his will litigation expenses as well as the amount he had paid at the auction. The board adopted a resolution which "ratified and reconfirmed" its previous authorization of the acquisition. (J.A. 141-46.)

The audit committee subsequently adjusted its computation of Joel's will litigation expenses on the basis of revised data, and arrived at a revised total "acquisition cost" of $397,200.29 (J.A. 146). Kay paid Joel $205,330.03 of this amount on December 12, 1966, another $185,300.26 on December 15, 1966, and the balance of $6,570 on January 19, 1967 (J.A. 179).

On August 30, 1967, Weiss' counsel, at his request, wrote each of Kay's directors asking that they have Kay take appropriate action to recover from Joel the difference of $191,870.26 between the amount Kay had paid Joel for the subsidiaries' shares and the amount he had paid at the auction. There was no response, and the action requested was not taken (J.A. 7, 11-12, 16). Weiss thereafter filed the complaint.

ARGUMENT

Preliminary Statement as to the Issues and the Propriety of Summary Judgment.

The only issue as to liability stated by appellants (J. Br. 1-2; C. Br. 2)[6] is the correctness of Judge Hart's holding that there was no genuine issue of material fact as to whether appellants engaged in a "scheme devised by [them] to reimburse Joel S. Kaufman [*sic*] for his personal expenses in a will contest unconnected with the corporate business. . . ." (J.A. 184). As we later show, Judge Hart's finding was eminently sound. We will also show that Judge Hart's conclusion that appellants breached their fiduciary obligations to their corporation can and should be affirmed on two other legal theories as well. Judge Hart was being unduly charitable to appellants when he remarked that these other theories *may* involve genuine factual issues (J.A. 184).

[6] "J. Br." and "J. Mem." refer, respectively, to the brief and the memorandum filed below for Joel Kaufmann. "C. Br." and "C. Mem." refer, respectively, to the brief and the memorandum filed below for Cecil Kaufmann and Hirshman.

Of course, a judgment, including a summary judgment, is sustainable on appeal on grounds not relied on by the trial court. 6 Moore, Federal Practice (2d ed.) par. 56.27[1], p. 2977; 9 *id.* par. 204.11 [2], p. 930; *Coleman v. Mountain Mesa Uranium Corp.*, 240 F.2d 12, 14 (10th Cir. 1956). If the judgment below is correct on any ground, it would be unfair to appellee and detrimental to judicial economy if a final disposition of the litigation were not made in this appeal.

Appellants challenge the propriety of the summary judgment on the grounds that their motives cannot properly be determined without trial and that they should be allowed to introduce additional evidence. These contentions will be considered later in connection with the legal theories of liability to which they relate. It is appropriate at the outset, however, to mention appellants' assertions that summary judgment is almost never appropriate in derivative actions for fraudulent breach of fiduciary obligations (J. Br. 24; C. Br. 14).[7]

We will show that this case fully satisfies the prerequisite for summary judgment that there be "no genuine issue as to any material fact." Rule 56(c), Fed. Rules Civ. Proc. This being so, the nature of the action is irrelevant. "[I]n whatever guise the issue of fraud may appear in an action, the general basic principles underlying summary judgment apply and if these are met, the issue of fraud may be summarily adjudicated." 6 Moore, *op. cit.*, par. 56.17[27], p. 2554. Moreover, "[I]t cannot be stated too strongly that no type of action or issue is immune from a summary adjudication and that there will be instances when the rendition of a summary judgment is clearly called for, although the

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[7] Joel Kaufmann ringingly declares that this is the first stockholder's derivative action in which summary judgment was granted for the plaintiff (J. Br. 30). His research has overlooked *Roth v. Fund of Funds*, 279 F. Supp. 935 (S.D. N.Y. 1968), aff'd 405 F.2d 421 (2d Cir. 1968), cert. den. 394 U.S. 975 (1969), rehearing den. 395 U.S. 941 (1969), the summary judgment referred to in *Bernstein v. Kennelly*, 433 F.2d 10 (9th Cir. 1970), and for all we know any number of other instances.

particular action or issue is one which does not lend itself to a summary adjudication as a general proposition." 6 Moore, *op. cit.*, par. 56.17[1], p. 2464. Accord: *Daily Press, Inc. v. United Press International*, 412 F.2d 126, 128 (6th Cir. 1969); *Bland v. Norfolk & Southern R.R.*, 406 F.2d 863, 866 (4th Cir. 1969).

Of course, summary judgment cannot be defeated by "fanciful doubts" (*Dewey v. Clark*, 86 U.S. App. D.C. 137, 143, 180 F.2d 766, (1950)) or "frivolous possibilities." *De Luca v. Atlantic Refining Co.*, 176 F.2d 421, 423 (2d Cir. 1949). See also, 6 Moore, *op. cit.*, par. 56.15[3], at p. 2346. Insofar as appellants claim that there are issues of fact, we will show that the claim does not rise above such levels.

The evidentiary facts on which we rely come from appellants themselves—their deposition testimony and their answers to the complaint—supplemented by documents, mostly supplied by appellants, whose authenticity and accuracy they do not dispute. It is true that summary judgment is prohibited if conflicting "permissible inferences" may reasonably be drawn from the underlying facts. *United States v. Diebold, Inc.*, 369 U.S. 654 (1952). We will satisfy this principle because we will rely on inferences only when no conflicting inferences can rationally be drawn.

I. THE LIABILITY OF JOEL KAUFMANN IS ESTABLISHED BY THE RECORD EVIDENCE AND INVOLVES NO GENUINE ISSUE OF MATERIAL FACT.

A. The Basic Principles Involved

Corporate directors are fiduciaries. Hence their dealings with their corporation must be both bona fide and fair to the corporation. A director's primary duty is "to deal fairly and justly with the corporation and its stockholders." *Condec Corp. v. Lunkenheimer Co.*, 230 A.2d 769, 775 (Del. Ch. 1967). "The rule that requires [of a director] an

undivided and unselfish loyalty to the corporation demands that there shall be no conflict between duty and self-interest." *Gottleib v. McKee*, 107 A.2d 240, 243 (Del. Ch. 1954). In Delaware as elsewhere there exists "the general rule that demands of an officer or director the utmost good faith in his relation to the corporation which he represents." *Guth v. Loft, Inc.*, 5 A.2d 503, 510 (Del. 1939).

Since transactions between a director and his corporation involve a conflict of interests, they are inherently suspect, and the burden of justifying their good faith and fairness is on the director. "Their dealings with their corporation are subjected to rigid scrutiny and where any of their contracts or engagements with the corporation is challenged the burden is on the director . . . not only to prove the good faith of the transaction but also to show its inherent fairness from the viewpoint of the corporation and those interested therein." *Pepper v. Litton*, 308 U.S. 295 (1939). Accord: *Fidanque v. American Maracaibo Co.*, 92 A.2d 311 (Del. Ch. 1952); *Levien v. Sinclair Oil Corp.*, 261 A.2d 911, 915 (Del. Ch. 1969); *Cheff v. Mathes*, 199 A.2d 548, 554-55 (Del. Ch. 1964); *Tansey v. Oil Producing Royalties*, 133 A.2d 141, 143 (Del. Ch. 1957); *Keenan v. Eshleman*, 2 A.2d 904, 908 (Del. 1938). The director's burden may be carried only "by clear and satisfactory evidence." *Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp.*, 89 U.S. App. D.C. 171, 179, 193 F.2d 666, 674 (1951). See also 3 Fletcher, Cyclopedia Corps. (Perm. Ed. 1965) § 919.[8] Manifestly, these principles apply with special rigor where the self-dealing director realizes a huge, quick profit from the transaction with his corporation.

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[8]We agree that appellants' substantive fiduciary obligations are determined by the law of Delaware, the state in which Kay is incorporated (C. Br. 11, n. 12). However, the locus of burden of proof is a "procedural" matter governed by the law of the forum. *United Air Lines v. Wiener*, 335 F.2d 379, 391 (9th Cir. 1964); *State Mutual Life Assurance Co. v. Wittenberg*, 239 F.2d 87 (8th Cir. 1956); *Sampson v. Channell*, 110 F.2d 754 (1st Cir. 1946); *Md. Casualty Co. v. Williams*, 377 F.2d 389 (5th Cir. 1967); Goodrich, Conflict of Laws

In the present case, the evidence supplied by appellants themselves shows that Joel Kaufmann, with the connivance of Cecil Kaufmann and Hirshman, his fellow directors and officers, bought property which he had already arranged to resell to his corporation at a higher price than he would pay, the resale price depending not on a valuation but on the amount of expenses incurred by him in a personal non-corporate venture. Then Joel in fact resold the property to the corporation at a profit of 93.6% on an investment he had held for a few weeks. One need not resort to the principle that Joel had the burden of proof to conclude that this transaction was neither fair nor honest.

In terms of precedents, the decisions establish three separate theories for holding Joel liable to the corporation for the amount of his profit. There is no genuine issue of material fact under either theory, and summary judgment was therefore appropriate. Rule 56, Fed. Rules Civ. Proc.; *supra*, p. 10.

B. Joel Kaufmann's Liability Under the Purchase-for-Resale Rule.

1. *The Rule.*

It is a breach of his fiduciary obligation for a corporate director to purchase for himself property for the purpose of reselling it to the corporation at a profit. In the event he does so, the director is liable to the corporation for the

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(3rd ed. 1949) §84; Leflar, American Conflicts Law (1968 ed.) § 124, pp. 298-99. *Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp., supra*, applied with regard to a Delaware corporation the District of Columbia rule that the burden of proving the validity of dealings between a corporation and its director is on the proponent of the transaction. The charter of that corporation contained the same self-dealing authorization as Kay's. Cf. 89 U.S. App. D.C. at 179, 193 F.2d at 674, with Exhibit C. to Hirshman affidavit. In any event, as the text citations show, Delaware law also places the burden of proof on the self-dealing director.

profit made on the resale. *Norte & Co. v. Huffines*, 304 F. Supp. 1096, 1108-09 (S.D. N.Y. 1968), aff'd, 416 F.2d 1189 (2d Cir. 1969); *New York Trust Co. v. American Realty Co.*, 244 N.Y. 209, 219, 155 N.E. 102, 105 (1926); *Bliss Petroleum Co. v. McNally*, 254 Mich. 569, 237 N.W. 53; *Parker v. Nickerson*, 137 Mass. 487, 497 (1884); *International Bankers Life Ins. Co. v. Holloway*, 368 S.W. 2d 567 (Tex. 1963); 3 Fletcher, *op. cit.*, § 899, pp. 320-1; § 950, p. 450. Cf. *Iowa Southern Utilities v. United States*, 348 F.2d 492, 497 (Ct. Cl. 1965). As stated in *Bliss Petroleum*, 237 N.W. at 55, and repeated in *Central Ry. Signal Co. v. Longden*, 194 F.2d 310, 319 (7th Cir. 1952), "If [directors] purchase personally, with the intention to sell to the corporation, or while purporting to act as corporation officers, the whole benefit of the purchase inures to the corporation, and the rule of secret profits applies."[9]

The rule that the corporation is entitled to recover the director's profit in a purchase-for-resale case without regard to the "true value" of the property is, of course, in accord with the general principle of damages whenever a fiduciary profits from a breach of his trust. *Magruder v. Drury*, 235 U.S. 106, 120 (1914); *Jackson v. Smith*, 254 U.S. 586, 588-9 (1921); *Marcus v. Otis*, 168 F.2d 649, 654 (2d Cir. 1948) (Delaware Corporation); 3 Fletcher, *op. cit.*, § 900, pp. 320-21; Restatement, Trusts 2d, §§ 205, 206. As stated in *Magruder* (at 120):

> "It makes no difference that the estate was not a loser in the transaction, or that the commission was no more than the services were reasonably worth. It is the relation of the trustee to the estate which prevents his dealing in such a way as to make a personal profit for himself."

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[9] Although the rule is conventionally stated in terms of the resale purpose of the purchase, it contemplates that the purpose was effectuated. If the director changes his mind after the purchase or the corporation refuses to purchase, the director's initial mala fides has not injured the corporation.

2. *The Evidence*

The record in this case unequivocally establishes that Joel Kaufmann profited by a violation of the purchase-for-resale rule. According to the deposition testimony of Joel and Cecil Kaufmann, prior to the auction sale of June 7, 1966, they had conversations, participated in by Hirshman, which devised the plan that Joel would bid in the stock at auction and then resell it to Kay at a price not to exceed book value but to include an allocable portion of his will litigation expenses. Cecil Kaufmann agreed to, and did, recommend the plan to Kay's board of directors, at a board meeting of January 25, 1966, also attended by Joel and Hirshman. The answers of appellees and Kay admit that the discussion at this meeting "contemplated" that Joel would purchase the securities at auction and Kay would then repurchase from him at his auction price plus a share of the will litigation expenses. At the same meeting, the board adopted a resolution authorizing Cecil to "negotiate" the repurchase, and Cecil appointed an audit committee whose function would be to compute the repurchase price under the contemplated formula, once Joel acquired the stock. Following the meeting and before the auction sale, Cecil and Joel had further conversations along the same lines as before. And Cecil and Joel explicitly testified in their deposition that prior to the auction they understood that Kay would repurchase the stock from Joel. (*Supra*, pp. 5-7.)

After Joel had purchased the stock, the repurchase by Kay was formally approved as soon as possible, at the next meeting of the Board of Directors, held on July 1, 1966. But even before then Joel had manifested his confidence that the pre-arranged approval would be forthcoming; for before July 1, 1966, he submitted to the previously appointed audit committee cost data to enable computation of the dollar repurchase price according to the prearranged formula. *Supra*, p. 8.

Kay's board of directors itself recognized that Joel S. Kaufmann could not lawfully realize a profit on the sale to

the corporation. For the resolutions adopted by the Board (J.A. 140, 141), and reported to the stockholders (J.A. 147), explicitly provided that the corporation would pay Joel's cost of acquisition, not to exceed book value. This formula, however, only magnified the directors' breach of trust by concealing from the stockholders that, as the Board knew from Cecil Kaufmann's explanation and from the report of the auditors, the agreed "acquisition cost" was inflated to about double its true size by the inclusion of expenses incurred by Joel S. Kaufmann in the will contest litigation. Thus Joel realized not only a profit but one which was a secret profit as respects stockholders who were not directors.

The undisputed facts thus demonstrate beyond shadow of doubt that there existed prior to the auction an "arrangement" between Joel and his co-directors that if he purchased the subsidiaries' securities at the auction, Kay would then purchase the securities from him at a price to include not only what he paid the auctioneer but also an allocable share of his huge will-litigation expenses, the total repurchase price not to exceed book value. Since Joel had proposed and was a party to the arrangement, and since he performed his end of it, there is no other rational conclusion possible but that he purchased the stock with the purpose of reselling it to Kay at the agreed higher price. Thus he is liable for his profit under the purchase-for-resale rule.

3. *Appellants' Contentions*

We turn now to those contentions of appellants which seek to refute Joel Kaufmann's liability under the purchase-for-resale rule.[10]

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[10]Most of these contentions are alluded to in appellants' briefs, although, as earlier stated, appellants brief the case as though the only issue of liability is the correctness of the theory on which Judge Hart relied.

a. The claim of a factual issue as to Joel's "purpose."

Joel Kaufmann contends that there is a genuine factual dispute as to whether "he acquired the subsidiary shares for the purpose of resale to Kay" (J. Br. 19, n. 26). This claim is based exclusively on the assertion in Joel's affidavit that he would have bid at the auction "regardless of whether or not Kay would subsequently buy some of these shares from me," because (1) he wished to keep the stock out of the hands of Weiss or his associates, and (2) he wished to recoup his will litigation expenses either by "acquir[ing] the stock at the sale and resell[ing] it" or by bidding up the price to other bidders for the benefit of his children, who were residuary legatees of the estate (along with Weiss). (J.A. 174; J. Br. 8.)

All this assertion does is to describe Joel's double motive for *bidding*. It does not contradict or exclude the fact which is relevant, namely, that at the time of bidding he had the purpose and intent to sell the stock to Kay if he was the successful bidder. To the contrary, that purpose was fully compatible with his motives, and its fulfillment was, indeed, the only, or at least the most practical, method of doing so.

The purpose of selling the stock *to Kay* conformed to alleged motive (1) because it kept the stock out of Weiss' hands.[11] The purpose conformed to motive (2) because Joel recouped his will litigation expenses by the price at which he sold to Kay. And Joel's contemplated alternate method of recoupment—to drive the price up to other bidders—was scotched by the fact that no other bidders appeared.

Furthermore, Joel's affidavit admits that, "I did hope to sell the shares in the Kay subsidiaries to Kay" (J.A. 175). The hope was no mere castle in Spain, but a solid expec-

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[11] Of course, it is hard to understand why motive (1) remained operative in Joel's mind once he discovered that he was the only bidder.

tancy from Joel's preceding negotiations, and its realization produced a quick, enormous profit. With such a hope, pre-arrangement and fruition, we cannot see how any one in his senses can deny that Joel had the "purpose" of achieving the hope.

In short, Joel's affidavit, so far from creating a factual dispute as to his purpose to sell to Kay, confirms that purpose.

b. The claim of a factual issue as to the "agreement."

Appellants claimed below that there was a genuine issue of fact as to whether "at the time that Joel Kaufmann purchased the shares at the sale, there was an agreement between Joel Kaufmann and Kay that Kay would buy the shares from Joel" (J. Br. 172; see also J.A. 176).

The claim is palpably without merit. We have already summarized (*supra*, p. 15) the evidentiary facts. From these only one inference can rationally be drawn—that at the time of the auction sale Joel had a pre-arrangement with his fellow directors that Kay would purchase the stock from him if he bought it at the auction.

No genuine issue of fact is created on this subject by the following assertion in Joel Kaufmann's affidavit (J.A. 174-75):

> "At the time that I purchased the shares, I had no agreement or understanding with Kay that Kay would buy the shares from me, except that I had told C.D. Kaufmann that I would be willing to sell the shares to Kay at the price I paid at the sale plus the allocable share of my expenses in the litigation which resulted in the sale, and C. D. Kaufmann had told me that he would recommend to Kay's board of directors that Kay acquire the shares in its subsidiary and affiliated companies from me on this basis, so long as the price of the shares did not exceed book value. I had no certainty prior to the July 1, 1966 vote by the board of directors

> that the other directors would accept this recommendation, and I did not expect C. D. Kaufmann to vote on the recommendation, as indeed he did not."

At first blush, the opening clause of this passage seems to be a general denial of a pre-arrangement, contradicting the detailed evidence that before the time of the auction Joel had arranged to sell the stock, if he acquired it, to Kay. Of course, this general, conclusory denial of an ultimate fact does not create a genuine factual issue, staving off summary judgment. *Woods v. Allied Concord Financial Corp.*, 373 F.2d 733 (5th Cir. 1967); *Bumgartner v. Joe Brown Co.*, 376 F.2d 749, 750 (10th Cir. 1967); 6 Moore, *op. cit.*, par. 56.22[1], pp. 2808-10. Moreover, the conclusory denial is pretty much belied by the immediately following "except" clauses.[12]

We believe, however, that the correct interpretation of Joel's statement is that it is not actually a perverse denial of the informal deal he had obviously made with his fellow directors and of the understanding which he admitted in his deposition, but rather that it is a deceptively phrased demolition of a straw-man, a denial that he had an advance *binding* agreement *with the corporation.* This is confirmed by the affidavit's reference to "an agreement or understanding *with Kay,*" the "except" clauses, and the subsequent assertion that "I had no *certainty* prior to the July 1, 1966 vote by the board of directors."

We do not contend that Joel's deal with his fellow directors was a binding contract with Kay or, for that matter, with them. And whether such a contract was necessary is a question of law, not one of disputed facts. As a matter

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[12]The "except" clauses, of course, conveniently omit some of the most significant evidence of the pre-arrangement, such as the discussion and resolution adopted at the board of directors' meeting of January 25, 1966, the appointment of the audit committee prior to the auction sale, Joel's and Cecil's deposition testimony of their understanding, and Joel's submission of data to the audit committee prior to the meeting which formally authorized the purchase by Kay.

of law, the purchase-for-resale rule does not require an advance contract or, for that matter, an informal pre-arrangement to sell to the corporation. By its terms the rule prohibits a director from purchasing for the purpose of selling to his corporation at a profit even if he waits till after his purchase to arrange the sale to the corporation. The significance of the evidence of Joel's advance arrangement is simply that it proves that when he purchased the subsidiaries' stock he had the purpose of selling it to the corporation.

That this was a breach of trust is not, in our view, debatable. Such a transaction is on the same order and as flagrant as a State highway commissioner's buying land in the path of a projected road, or a corporation officer's taking "kick-backs" from contractors or receiving large sums from his corporation for fictitious services. The existence of an advance contract or arrangement is not called for by the rule or by its underlying principle—that a director may not exploit his corporation for his own advantage. The hypothetical highway commissioner also does not have a formal advance contract to sell to the State the land he buys in the route of the planned highway.

c. Contentions eliminating the purchase-for-resale rule.

Joel Kaufmann flatly denies the existence of any legal principle that a corporate director may not buy property with the purpose of reselling it to the corporation at a profit (J. Br. 19, n. 26). He also seems to assert *(ibid.)* that even if there is any such rule it applies only if the director had pre-empted a corporate opportunity when he bought the property. Of course, the latter assertion also eliminates the purchase-for-resale rule since the pre-emption of the corporate opportunity is alone enough to create liability.

Joel's contention is contrary to the authorities cited *supra*, p. 14, as well as to elementary concepts of a director's fiduciary responsibility (see *supra*, pp. 11-12). It is almost unnecessary to add that the cases and section from

Fletcher which Joel cites for his proposition (J. Br. 19, n. 26) do not support it. They simply stand for the commonplace principle that a corporate director is not by reason of his office prohibited from selling property to the corporation for a fair price even if he thereby makes a profit. But this generalization only applies to property which the director happens to own and which he did not acquire for resale to the corporation. The generalization does not contradict the purpose-for-resale rule. In fact, of the three cases cited by Joel, two expressly refer to the purchase-for-resale rule which he claims is non-existent. *New York Trust Co. v. American Realty Co.*, 244 N.Y. 209, 219, 155 N.E. 102, 105 (1926); *Bliss Petroleum Co. v. McNally*, 259 Mich. 569, 237 N.W. 53, 55 (1931). So does Fletcher in sections cited *supra*, p. 14.

Joel's attempt to make the purchase-for-resale rule a meaningless appendage to the corporate opportunity doctrine illogically commingles two separate legal principles designed to vindicate two different types of breaches of a director's fiduciary obligations. The essence of the corporate opportunity doctrine is that a director may not, in pursuit of his personal advantage, deprive his corporation of property which it wishes to acquire (or would wish to acquire if it knew it was available) and which will advantage its business. *Equity Corp. v. Milton*, 221 A.2d 494, 497 (Del. 1966). Accordingly, if the property is of not much use to the corporate business or if the corporation has made a bona fide decision not to acquire it, the doctrine does not prohibit the director from acquiring the property for himself.

In the purchase-for-resale situation, however, the director manifestly does not deprive the corporation of the property he acquires. To the contrary, he can only fulfill his purpose by reselling it to the corporation at a profit. Since the corporation in fact ends up with the property, the director has deprived the corporation not of the property he bought and resold, but of money—the difference between the price he paid and the price the corporation

paid him. If the property happens to be something which is of no great use to the corporation or which the corporation does not really want, that fact does not excuse the breach of trust. Rather it adds insult to injury, since it is worse to be mulcted by an overcharge for relatively useless property than by an overcharge for useful property.

Cecil Kaufmann and Hirshman seek to eliminate the purchase-for-resale rule by indirection. They argue: (1) the corporate opportunity doctrine did not apply so as to prevent Joel from acquiring the stock; (2) therefore he could validly resell the stock to Kay at a profit because, "Once the executive has legitimately acquired the property, the law is equally clear that he may resell it to his corporation at a price higher than he paid" (C. Br. 8-9, n. 10).

The flaw in this two-step argument is that it assumes that property is "legitimately acquired" by a director so long as he has not violated the corporate opportunity doctrine. The argument thus overlooks the existence of the principle, independent of the corporate opportunity doctrine, that a director's purchase is illegitimate if made with the purpose of reselling the property to his corporation at a profit. The cases cited by Cecil and Hirshman for the second step of their argument merely repeat two of Joel's citations for the irrelevant principle that a director is not per se disqualified from selling to his corporation at a profit. See *supra*, p. 21.

If Joel had bought the stock at auction without prearrangement or purpose to resell to Kay, and assuming as we do, that his acquisition did not violate the corporate opportunity doctrine, he could thereafter have sold it to Kay at a profit, provided (1) the price was not excessive (see *infra*, p. 28), and (2) Kay bought the stock from him for a valid corporate purpose (*infra*, p. 32). *Lipkin v. Jacoby*, 202 A.2d 572 (Del. Ch. 1964).[13] But that is not

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[13] *Lipkin* held that the sale by directors of certain property to their corporation at a profit was not a breach of trust. The opinion in *Lipkin* makes it clear that all the qualifications stated above were satisfied–*i.e.*, the directors had not originally acquired the property

this case even if we leave to later discussion the excessive price and absence of a valid corporate purpose. Here the purchase and resale were not independent transactions. They were tied together by the fact that the purchase was made with the purpose of reselling to Kay, and this purpose was accomplished. Appellants' argument ignores the crucial fact by divorcing the purchase from the resale.

d. The "pre-existing interest" contention.

Appellants stated below that the purchase-for-resale rule "does not apply to property in which the director already has an interest" (J. Mem. 17). By reason of this principle, they contended, Joel was exonerated because he had an interest in the subsidiaries' stock prior to his arrangement to buy at auction and then resell to Kay. This interest was seen to arise out of two circumstances—that Joel "had invested some $290,000 in the costs of the [will] litigation" and "more important, under Robert's penultimate will then pending probate, Joel's two sons owned a one half interest in the residual estate from which stock was being sold" (J. Mem. 14).

The alleged legal principle which is the predicate for the argument does not exist, and there are no decisions which even remotely support it. The argument itself makes no sense.

Joel had no property interest in Robert's estate, much less a property interest in a specific asset of the estate (the subsidiaries' stock), by reason of the fact that he had financed his sons' successful undertaking to set aside Robert's last will.[14] Joel did have a motivation, no doubt strengthened by the expense of the will litigation, that the estate

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for the purpose of resale to the corporation (see 202 A.2d at 574), the original acquisition had not been a pre-emption of a corporate opportunity, the price to the corporation was fair, and the corporation had made its purchase for legitimate corporate reasons.

[14] It may be added that the Surrogate allowed to be charged to the estate only $100,000 for the litigation expenses of the successful contestants (J.A. 162).

realize a high price for its assets. But it is inconceivable that a breach of trust can be excused because it was committed for the financial benefit of the fiduciary or his family. That is the reason for most swindles by fiduciaries.

Furthermore, even if Joel had some kind of "interest" in the assets of the estate by virtue of his litigation expenses, that "interest," whatever it was, is not what he sold to Kay. Nor is it conceivable that it would have served any valid corporate purpose for Kay to have acquired that "interest."

If Joel was legally authorized to sell assets belonging to his children—a contingency which is not reflected by the record or claimed by him—, he could, as their agent, legitimately sell to Kay their interest in the estate, provided that the price was fair and that Kay had a valid corporate purpose in buying it.[15] This situation would not, as appellants seem to think, constitute an exception to the purchase-for-resale rule. The rule would simply not be applicable by its terms. Being a legacy, the property involved was not purchased by the children; it was not obtained by them for the purpose of reselling it to Kay; and besides the children were not directors of Kay.[16]

This case, however, does not involve a sale by Joel, as his children's agent, of their interest in assets of Robert's estate. First, Joel sold Kay not his children's interest in the estate but the stock itself, which had been, prior to his auction purchase, an asset of Robert's estate in which per-

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[15] The provisos would apply because Joel could not lawfully disregard his fiduciary obligations to Kay in order to serve the interests of other parties (his children) for whom he was also a fiduciary (their agent). The usual situation of dual fiduciary responsibility involves a transaction between two corporations with an interlocking directorate. In such a case, the common directors may not favor one of their corporations over the other, but must be fair to both. *Levien v. Sinclair Oil Corp.*, 261 A.2d 911, 915 (Del. Ch. 1969).

[16] Of course, the purchase-for-resale rule would prohibit Joel from buying his children's interest with the purpose of reselling that interest to Kay. Nothing of that sort happened here.

sons other than Joel's children (including the other residuary legatee, Weiss) had interests. Joel does not claim that he was authorized to sell the interests of these strangers or that he was an agent for Robert's estate.

Secondly, Joel sold the stock on his own account. Neither the estate nor his children received an amount equal to that paid by Kay for the stock. The estate received for the subsidiaries' stock only a little over half of the amount Joel received from Kay.

Appellants' argument comes down to the proposition that the purchase-for-resale rule does not apply because in this case, unlike most others as we may suppose, the director's children had an interest in the property which he bought for the purpose of reselling to the corporation at a profit to himself. The proposition is obviously untenable. Suppose the subsidiaries' stock had not been sold, but transferred to Joel's children as their distributive share. Suppose Joel then bought the stock from the children in order to resell it to Kay at a profit to himself. There is no rational basis for saying that Joel did not violate the purchase-for-resale rule because of the irrelevant fact that he made his purchase from kin. This hypothetical case is not different in principle than the actual case.

e. The "no profit" contention.

Joel sold the subsidiaries' stock to Kay for about \$192,000 more than he had just paid for it at the auction. Appellants insist, however, that he made no profit or net gain in the transaction. The theory for this view is stated as follows: "Since the stock would never have been offered at auction had not Joel contested the will, his expenses in doing so were in the most practical sense a cost of his acquiring the stock and he obtained no profit on the transaction in any sense relevant here." (C. Br. 22-23. See also J. Br. 19-20, n. 27.)

The contention is frivolous. "Cost of acquisition" does not include any and every expenditure made for a purpose

other than and distant from the acquisition merely because it eventually appears by hindsight that there is a remote, "but-for" causal connection between the expenditure and its acquisition. Appell~~ees~~ants themselves say that expenses, to be deductible, must be "proximately related to the profits" (C.B. 23, no. 26), and even this generalization overstates the authorities they cite for it.[17]

The auction sale was merely a collateral consequence of the will contest. The will contest did not seek to force a sale of the estate's securities, nor was such a sale a necessary or even foreseeable result. The purpose and effect of the will contest was to transfer half the residuary estate from Weiss, the beneficiary of Robert's last will, to Joel's children, who were co-beneficiaries with Weiss of the penultimate will. This purpose was accomplished by the setting aside of the will without regard to the auction sale.

By appellants' logic, Joel's "cost of acquisition" should have included his expenditures for the rearing and support of his children. These disbursements also had a "but-for" causal relationship to the auction sale, since they enabled Joel's children to survive Robert. If the children had not survived, they would not have been beneficiaries of Robert's penultimate will; Joel would not have instituted a will contest for their benefit; and the stock would not have been sold at auction.

The conclusive proof that Joel's will litigation expenses were not a legitimate cost of the purchase is that had anybody else bought the stock at the auction, his cost of acquisition would obviously not have included Joel's will litiga-

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[17]Thus 3 Fletcher, *op. cit.*, §950, p. 450, refers to "necessary intervening expenses." *Central Ry. Signal Co. v. Longden*, 194 F.2d 310, 324 (7th Cir. 1952), allowed "the reasonable cost of the undertaking." Appell~~ees'~~ants' authorities do not speak in terms of a "proximate" relationship. The expenses involved in the cases were so immediate and obvious that they were allowed as a matter of course once a principle of deductibility was recognized. The cases are not helpful in establishing a generalization as to what expenses are "necessary" or "reasonable" "costs of the undertaking" or are costs "from which sprang the profits" (*Longden* at 324).

tion expenses. The will contest may have been a cause of the auction, but it was not a cause of Joel's being the purchaser at the auction.

Finally, appellants' contention depends on unsound bookkeeping. Joel's will litigation expenses were a speculative investment from which he realized a handsome return. The investment produced a half interest in a million dollar estate for his children plus an opportunity (by contesting the penultimate will) to acquire the other half interest for his brother Aron. Joel debited Kay with the cost of his investment by including it as an "acquisition cost." But he did not credit Kay with any of the receipts from the investment. Yet no honest balance sheet records only the expenses of a venture and none of its receipts. Such an accounting method is guaranteed to convert gains into "losses."

f. The "board approval" contention.

Joel argued below that he was insulated against accusations of breach of trust because the transaction was approved by a financially disinterested board of directors to whom he had made a full disclosure (J. Mem. 23-25).

Joel committed a fraud on his corporation by purchasing the subsidiaries' stock with the purpose of reselling it to Kay at a profit and by making the resale at a profit. Of course, neither Delaware nor any other State exonerates a director's fraud because it was perpetrated with the acquiescence (and, in this case, the connivance) of the board of directors, no matter how "disinterested," "informed," and well-intentioned. Approval by corporate directors, and even by a majority of the stockholders if not unanimous, cannot excuse fraud, waste, gifts of corporate assets, corporate purchases at grossly disproportionate prices, unconscionable deals, or purchases for a non-corporate purpose. *Mayer v. Adams*, 141 A.2d 458, 460 (Del. 1958); *Gottlieb v. McKee*, 107 A. 240, 243 (Del. Ch. 1954); *Kerbs v. Calif. Eastern Airways*, 90 A.2d 652, 655 (Del. 1952); *Gottlieb v. Hayden Chemical Corp.*, 90 A.2d 660, 665 (Del. 1952);

Fidanque v. American Maracaibo Co., 92 A.2d 311, 321 (Del. Ch. 1952); *Saxe v. Brady*, 184 A.2d 602 (Del. Ch. 1962); *Bennett v. Propp*, 187 A.2d 405 (Del. 1962).

The boiler-plate provision in Kay's charter, relating to transactions between the corporation and its directors, is by its terms applicable only "in the absence of fraud" (Exhibit C to Hirshman affidavit). And see *supra*, p. 13, n. 8.

C. Joel's Liability Because of the Excessive Price.

A second ground for Joel's liability, independent of the purchase-for-resale rule, is that he violated his fiduciary duty to deal fairly with Kay by selling the subsidiaries' stock to it at an excessive price.

A director is not per se prohibited from selling property to his corporation at a profit.[18] But under the law of Delaware as elsewhere, the director may not charge his corporation more than a fair price—i.e., more than the property is reasonably worth. *Lipkin v. Jacoby*, 202 A.2d 572, 575 (Del. Ch. 1964). Furthermore, in any corporate transaction, whether with a director or a non-director, a gross disparity between the price paid by the corporation and the consideration received is a badge of fraud. *Fidanque v. American Maracaibo Co.*, 92 A.2d 311, 321 (Del. Ch. 1952); *Karasik v. Pacific Eastern Corp.*, 180 Atl. 604, 607 (Del. Ch. 1935); *Allied Chemical & Dye Corp. v. Steel & Tube Co.*, 120 Atl. 486, 494 (Del. Ch. 1923).

The record shows that such a gross disparity existed here, and there is not a fragment of countervailing evidence to justify the disparity or to raise a genuine issue of fact. Hence the badge of fraud was not removed.

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[18] This principle presupposes, of course, that the director did not violate his fiduciary obligations in acquiring the property—e.g., that he did not purchase the property for the purpose of resale to the corporation, or with corporate funds, or in violation of the corporate opportunity doctrine.

Three weeks after he bought the stock at auction, Joel sold it to Kay at an increase of about $192,000, or 93.6%, above what he had paid. Appellants do not and cannot claim that the difference between the auction price paid by Joel and the amount paid by Kay is not a "gross disparity." Nor do they contend that some development in the interval between Joel's purchase and the resale caused a sensational enhancement in the worth of the stock. Their position is that the auction price may not be regarded as the value of the stock for summary judgment purposes. However, the only rational conclusion is that the auction price was not less than true value.

After taking expert testimony, the Surrogate issued a considered opinion in which he valued the subsidiaries' stock for upset price purposes at $205,330.03 (*supra*, p. 4). This valuation, standing by itself, was not conclusive of the actual value. The market itself, however, confirmed that the judicial estimate was not an undervaluation. Although the auction was publicly advertised, and although Weiss actively attempted to enlist bidders (J. Br. 7; C. Br. 6, n. 5), there was only one bidder, Joel, who was thus able to purchase at the upset price. And Joel, it must be remembered, could only gain by buying at that price, since he already had made his arrangement to resell to Kay.

Appellants rely on the fact that Kay paid less than book value (C. Br. 17), a circumstance attributable not to Kay's bargaining endeavors, but to the happenstance that the lawyers in the will litigation did not charge Joel even more than they did. Everyone knows, however, that book value rarely corresponds to market value, and under Delaware law book value cannot discredit a value set by an open market transaction.

In *Equity Corp. v. Milton*, 221 A.2d 494 (Del. 1966), a director purchased from third persons stock in his corporation (Equity) at a price which was about half of book value. The court rejected an argument that this fact showed that the price would have been advantageous to the

corporation. The court stated (at 497), "[A]s a practical matter it seems obvious to us that no one is going to exchange assets for Equity stock valued at its net asset value when that value is approximately twice the amount required to buy Equity shares on the open market. The argument seems to fly in the face of common financial judgment."

The amount paid by Kay to Joel was the equivalent of 81% of the book value. So far from showing that the acquisition was a bargain, this fact is additional proof that Kay grossly overpaid.

The Surrogate determined the upset valuation on April 19, 1966. By that time Joel's fellow directors had already manifested a willingness to have Kay pay him as much as 100% of book value, if that was necessary to compensate him for his will litigation expenses.

The Surrogate found that stock in Kay, the parent corporation, was selling on the American Stock Exchange for only 40% of book value. Since the subsidiaries' stock was less marketable, not being listed on the Exchange, the Surrogate held, in accordance with elementary financial principles, that the stock "could not conceivably be evaluated higher than the parent on a book value basis." He then set an upset price on the stock valued on a book value basis at 30% of the book value (J.A. 167). That Kay paid 81% of the book value (and was willing to pay 100%) of the subsidiaries' stock, while its own stock was selling at 40% of book value, confirms the excessiveness of the price.

Under all the circumstances, the only rational inference is that the auction price was not less than reasonable value, though it may well have been more.

Appellants say that the stock's "intrinsic value to the Company" and its "actual value" may have been higher than the auction price (C. Br. 17-18). The record, however, contains no evidence to that effect, nor are corporate directors entitled to buy property at an amount corresponding to "intrinsic value" if they can buy on the market for less.

Appellants' supposition is no more than a "frivolous possibility," which cannot avert summary judgment. *Supra,* p. 11. Appellants introduced no evidence of a higher market worth. It is of no avail for them now to say that "the subject is one appropriate for an expert financial witness" (C. Br. 22). This statement is less than a representation by counsel of what they expect to prove. But even such representations cannot defeat summary judgment, nor may the party resisting summary judgment hold back his evidence until the time of trial. *Robin Construction Co. v. United States,* 345 F.2d 610, 613 (3rd Cir. 1965); 6 Moore's Federal Practice (2d ed.) pars. 56.22[1] (especially at p. 2810), 56.23 (at p. 2854).

We cannot take seriously appellants' intimations that they might have introduced evidence of value and a bona fide corporate purpose had they not been misled by a last-minute switch in appellee's legal theory (J. Br. 22; C. Br. 9, 16, n. 18). First, the alleged switch is a self-induced fantasy. Our original Memorandum in support of the motion for summary judgment should have made it clear, even were opposing counsel less eminent and astute, that we were challenging the bona fides and unconscionable price of the transaction and were relying on the enormous differential between the price Joel paid and that which Kay paid him. At the outset of our legal argument we stated our basic theory as follows (Weiss Mem., p. 3):

> "It is elementary that corporate directors are fiduciaries and have the burden of proving that transactions between them and their corporation are both bona fide and fair. . . .
>
> "In the present case, there is nothing to justify Joel S. Kaufmann's sale of property to Kay Jewelry at a price higher than he paid. . . . With the connivance of Cecil Kaufmann and Hirshman, his fellow directors and officers, Joel S. Kaufmann bought property which he had already arranged to resell to

> the corporation, and then resold to the corporation at a profit of 93.6% on an investment of a few months. Manifestly, this transaction was neither fair nor honest."[19]

Secondly, it is clear that appellants were not misled as they claim. For though they did not supply evidence of value, they did argue that the record in its present form demonstrates that the price paid by Kay did not exceed true value (J. Mem. 11; C. Mem. 11) and that they had exercised a good-faith business judgment (J. Mem. 24; C. Mem. 14-18).

Thirdly, if appellants needed additional time to present affidavits, they should have asked for it. They made no such request.

D. Joel's Liability Under the "Scheme" Theory.

The third theory on which Joel is liable is that, as Judge Hart ruled, he participated with the other appellants in a scheme devised to reimburse him from Kay's funds "for his personal expenses in a will contest unconnected with the corporate business" (J.A. 184).

Appellants do not dispute that such a scheme, if it existed, was a breach of their fiduciary obligations. Their argument is that there is a genuine issue of fact as to the existence of the scheme, so that summary judgment is precluded.

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[19] Appellants also convinced themselves below, and now repeat their error (C. Br. 8, 16, n. 18), that appellee was basing his case in part on the corporate opportunity doctrine of *Guth v. Loft*, 5 A.2d 503 (Del. 1939). We had referred to the doctrine only to illustrate the fiduciary responsibility of corporate directors. In doing so, we expressly pointed out that the doctrine applies only "if the director does not buy the property for resale to the corporation" (Weiss Mem. 8), a factual situation which we had already excluded by our preceding argument that Joel Kaufmann had breached his fiduciary obligation by buying "property which he had already arranged to resell to the corporation, and then resold to the corporation at a profit. . . ." (Weiss Mem. 7).

There can be no question but that the motivation for Joel's sale of the stock to Kay was his desire to recover his litigation expenses. This fact appears not only from the price-fixing formula, which he was the first to suggest (J.A. 37), but also from his conversations with Cecil and Hirshman and his affidavit acknowledging a motivation "to recoup a portion of these expenses" by buying the stock at auction and then reselling it (J.A. 174).[20] It is also obvious that Cecil and Hirshman knew of Joel's motivation from what he told them (see J.A. 37, 53, 72, 99-100).

The questions which remain as to the existence of the three-party scheme found below are (1) whether the motivation of Cecil and Hirshman in promoting the Joel-Kay transaction was to help Joel recoup his will litigation expenses without regard to whether or not the corporation benefited, and (2) whether Joel knew of their motivation.[21] If the answers are in the affirmative, the scheme is established. If the record establishes this motivation of Cecil and Hirshman, uncomplicated by a genuine issue of fact, it also establishes Joel's knowledge of their motive, for Joel knew all the facts which establish it.

The motive of Cecil and Hirshman is, we believe, more appropriately discussed in the later section of our brief dealing with their liability. We there show that their motivation was that stated above and was correctly found on

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[20] As we have seen, Joel's claimed desire to keep the stock out of Weiss' hands was a motive for bidding at the auction (which should have vanished once no other bidder than he appeared), not inconsistent with reselling to Kay. Also, the nonappearance of other bidders prevented Joel's alternate possibility of recouping his will litigation expenses by bidding up the auction price to others. See *supra*, p. 17.

[21] If Joel did not know of the illicit motivation of Cecil and Hirshman, that would exonerate him (but under the scheme theory only). Cecil and Hirshman would nevertheless be liable since it is a violation of a director's fiduciary duties to expend corporate funds for the non-corporate purpose of benefiting an individual even if the latter is unaware of the director's generosity at corporate expense.

motion for summary judgment. Thereby we complete the missing link in the chain of proof of their liability and Joel's under the scheme theory.

II. THE LIABILITY OF CECIL KAUFMANN AND HIRSHMAN IS ESTABLISHED BY THE RECORD AND WAS PROPERLY FOUND BY SUMMARY JUDGMENT.

A. Their Liability Because of the Violation of the Purchase-for-Resale Rule and Because of the Excessive Price.

We have already established that there is no genuine issue of fact but that Joel Kaufmann breached his fiduciary obligation (1) by buying the subsidiaries' stock for the purpose of reselling to Kay at a profit, and (2) by selling to Kay at an excessive price. Cecil Kaufmann and Hirshman knew of the facts which establish this double violation by Joel. They knew of the repurchase arrangement which establishes his resale purpose and of the facts which demonstrate the excessiveness of the price he charged Kay. Having this knowledge, they breached their own fiduciary obligations merely by failing to prevent Joel's breaches. Under Delaware law, directors who tolerate a wrongful diversion of corporate funds are jointly liable with the prime tortfeasor. *Lutz v. Boas,* 171 A.2d 381, 392 (Del. Ch. 1961); *Marcus v. Otis,* 168 F.2d 649, 660 (2d Cir. 1948) (involving Delaware corporation).

In fact, however, Cecil and Hirshman did more than tolerate Joel's known malfeasance. They actively aided, abetted and participated in the accomplishment of his fraud. Thereby they are liable as joint tortfeasors. They come under the principle that all those who participate in a fiduciary's fraud, whether or not they personally profit, are jointly and severally liable, including both participants who are themselves fiduciaries and those who are not. *Keenan v. Eshleman,* 2 A.2d 904, 908-9 (Del. 1938); *Bennett v. Propp,* 187 A.2d 405, 411 (Del. 1962); *Jackson v. Smith,* 254 U.S. 586, 589 (1921); *Norte & Co.*

v. Huffines, 304 F. Supp. 1096, 1109 (S.D. N.Y. 1968), aff'd 416 F.2d 1189 (2d Cir. 1969); *Stopford v. Haskell*, 147 F. Supp. 509, 510 (D. Conn. 1957); 3 Fletcher, op. cit., § 950, pp. 451-2; 3A Moore, *op. cit.*, par. 19.13[1], p. 2381.

The purity of motive alleged on the part of Cecil and Hirshman is relevant to the "scheme" theory of liability. Their motives, however, are irrelevant to their liability as joint tortfeasors under the theories now under consideration. This liability depends not on motive but on their knowledge of Joel's resale purpose and the excessiveness of the price paid. This knowledge would not be eliminated by their testimony that they were actuated only by worthy motives, even if anyone were credulous enough to believe it.

Also irrelevant is the latitude allegedly given by Delaware law to the business judgment of financially disinterested directors (C. Br. 12; J. Br. 28). We are attacking not a business decision of Cecil and Hirshman, but their toleration of and participation in a fraudulent transaction. Delaware law does not respect the "business judgment" of directors where there is "a showing of bad faith on the part of the directors or a gross abuse of discretion." *Warshaw v. Calhoun*, 221 A.2d 487, 492-93 (Del. 1966). See also *supra*, p. 27. We have also seen that under Delaware law, the gross disparity between the worth of the subsidiaries' stock and the price paid by Kay is prima facie proof of fraud. *Supra*, p. 28.

B. The Liability of Cecil Kaufmann and Hirshman Under the Scheme Theory.

To support application of the scheme theory to all three appellants there remains to be shown (1) that the motivation of Cecil and Hirshman in promoting Joel's transaction with Kay was to help Joel recoup his will litigation expenses rather than to benefit the corporation; and (2) that this motivation could properly be found by summary judgment. See *supra*, p. 33.

1. *The Evidence of the Illicit Motive.*

a. The pricing of the purchase.

The first proof of bad motive lies in the price Kay paid and the formula for computing it. The key variable in the formula was not a factor relating to the worth of the stock but one designed to enable Joel to recoup his will litigation expenses. Moreover, Cecil recommended this formula to the board of directors at a time when he had no idea of the magnitude of the litigation expenses (J.A. 43). The equally uninformed board favored the recommendation and took steps to implement it. Cecil and his co-directors, including Hirshman, thus evinced a supreme indifference to what price Kay would pay between the levels of $205,330 (the upset price) and $490,420 (the book value ceiling). Simultaneously, the nature of the formula evinced their concern that Joel recover his litigation expenses.

The obvious implications of the foregoing could be countered if the purchase was at an advantageous cost, for that could imply that the directors were motivated by a desire to benefit their corporation. The facts, however, require an opposite conclusion. We have already seen that Kay paid Joel a price grossly in excess of actual worth. Cecil and Hirshman must have been aware of this fact if only because Kay's own stock was then selling at only 40% of book value. *Supra*, p. 30. Moreover, their duty as directors required them to investigate the facts relating to value before they bought. They could not discharge that duty by wilfully blinding themselves to available facts (such as the Surrogate's appraisal) indicating that the actual worth of the stock was far below the price to be paid to Joel.

b. The absence of a legitimate motive for the purchase.

Absent an ulterior motive or irresponsible neglect, no director in his right mind could have approved Kay's purchase from Joel unless he genuinely believed that the acquisition would bring substantial benefits to Kay to compensate for the exorbitant price. The record, however,

negates the possible exception. It shows that Kay's directors had no genuine desire to acquire the stock except by the arrangement with Joel, and it contains no evidence that the acquisition was beneficial to Kay.

Kay's directors exhibited no interest in acquiring the subsidiaries' stock prior to the time Joel suggested the acquisition. When Joel first broached the subject, Cecil made the tepid response, "I don't see any reason why the company wouldn't want them because if they fell in other hands there could be a source of considerable difficulty in this number of corporations" (J.A. 36).

This lack of zeal contrasts with Kay's actions with respect to certain other subsidiary stock owned by Robert's estate, which Kay really wanted. Kay made an offer to the temporary administrator to purchase this other stock by an exchange, and acceptance of the offer was approved by the Surrogate in the same opinion which fixed the upset price for the stock to be auctioned (J.A. 169).

The evidence that Kay had no yearning to acquire the stock from anybody but Joel is confirmed by appellants' failure to supply a scintilla of proof that Kay had a good reason to acquire the stock.[22] Cecil testified in his deposition that he "definitely" considered it in the interest of the corporation to acquire the stock (J.A. 40-41). This noble generalization was not supported by specifics, and therefore does not create a factual issue capable of averting summary judgment (*supra*, p. 19). Nor was such a specific supplied by Cecil's statement to Joel, and like speculation in his brief, that if the subsidiaries' stock fell into the hands of outsiders, that could be a source of difficulty for the parent corporation (J.A. 36; C. Br. 16). Joel, neither an outsider nor a putative troublemaker, had already told Cecil of his determination to acquire the stock and keep it out of the hands of strangers (J.A. 35, 39). Thus protection against the possible difficulty was supplied by Joel's purchase of

[22] We examine later the reasons given by Cecil for Kay's not bidding at the auction. Reasons for not bidding are not reasons for Kay's acquiring the stock.

the stock, and there was no point in Kay's buying it from him.

Counsel represent that they could have introduced evidence that in 1966 and 1967 Kay "made purchases of stock interests in its subsidiaries from minority holders having no other relation to the Company" (C. Br. 16).[23] There is, however, no logic in the claim that such prior purchases have a tendency to show a good reason for Kay to make its later purchase from Joel and hence good faith on the directors' part. Besides, counsel are discreetly silent as to the cost of the prior purchases and its relation to book value.

It is true, as Cecil and Hirshman say, that "there is nothing sinister or peculiar about a corporation's purchase of stock in its own subsidiaries" (C. Br. 16). Nor do we doubt that, as Cecil put it to Joel, there was no reason "why the company shouldn't want" the stock, and that Kay might just as soon have wanted to have the stock as not. The relevant question here, however, is whether there was any reason good enough for Kay's directors to "want" the stock at such an excessive cost. Appellees have not supplied any such reason, much less produced evidence of it, and all the evidence is in the opposite direction.

c. Kay's failure to bid at the auction.

Appellees insist that Kay's directors had good reasons, indicating an exercise of sound "business judgment," for not attempting to acquire the subsidiaries' shares by bidding at the auction (J. Br. 23; C. Br. 18-19).

An exploration of Kay's reasons for purchasing through Joel rather than by bidding at the auction goes down a strictly one-way street. The existence of good reasons to prefer one method of acquisition over the other does not signify that the acquisition itself was justifiable and honestly motivated. On the other hand, if Kay's reasons

[23]We have already seen (*supra*, pp. 31-32) that there is no substance to counsel's suggestion that they were euchered out of an opportunity to produce evidence that Kay's purchase from Joel was bona fide and reasonable.

for not bidding at the auction were frivolous or bad, that would be convincing proof that Kay's directors had a dishonest motivation—that their real purpose was not to acquire the stock, but to acquire it *from Joel.*

We next examine the reasons assigned by appellants for Kay's failure to use the auction route. This examination will show that the reasons are so specious and contrived as to be additional evidence of bad faith.

The first reason assigned for the failure to bid is that Cecil believed that Joel would have bid against Kay (C. Br. 18-19; J. Br. 23). The deposition testimony does not bear this out. Joel testified that he thought he told Cecil and Hirshman that if there was competition at the auction he would bid the price up in order to recoup his litigation expenses (J.A. 99-100). According to Cecil's testimony, Joel expressed a determination not to allow the stock to get into the hands of strangers (J.A. 35, 39, 49-50). Kay was no stranger, and Cecil also testified, "I don't believe Joel would bid against the company" (J.A. 50). Of course, insofar as Cecil's motives are concerned, the important thing is not what Joel said but what Cecil understood.

In any event, it is beyond belief that directors concerned with the corporate welfare and exercising sound "business judgment" would have surrendered so readily, one might say eagerly, to Joel's alleged threat when the cost of the capitulation was so enormous and when defiance of the threat would not predictably have resulted in a higher cost.[24] Cecil neither hesitated nor remonstrated (J.A. 44-45). Yet he, and certainly Hirshman, Kay's general counsel, should have realized that Joel was threatening a breach of trust. Even assuming that Joel could legitimately bid against Kay at all (but see *Burg v. Horn*, 380 F.2d 897, 899 (2d Cir. 1967), and *supra*, pp. 11-12), he could no more bid Kay up to paying Robert's estate an excessive price than he

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[24] Since Joel was satisfied with the price he got from Kay, he should also have been satisfied not to bid the auction price up to a higher level.

could charge Kay an unfair price if he were selling to Kay on his own account or as an agent. See *supra*, pp. 24, 28.

The second reason assigned for Kay's failure to bid at the auction is that Cecil was "concerned that direct participation by the Company might excite the interests of other potential bidders and thus increase the price paid" (C. Br. 19; see J. Br. 23). This does not explain why Kay did not seek to negotiate the purchase from the estate without an auction. Besides the suggestion is fanciful, especially as an excuse for engaging to pay Joel up to book value, a potential liability of $285,000 more than the upset price. Kay's treasurer, Joel, went to bid at the auction, escorted by Kay's secretary and general counsel, Hirshman. They were at least as likely to excite potential bidders as some lesser company luminary or a straw man.

The last alleged reason for Kay's failure to bid was that the subsidiaries' stocks were auctioned in three lots, two of which included some non-subsidiary stock, and under a loan agreement Kay could not buy more than $238,000 of non-subsidiary stock (C. Br. 19, 6, n. 6). The upset price for the non-subsidiary stock amount to only $92,000 (*supra*, p. 4). This sum was well within the allowable margin, nor was it so substantial as to warrant Kay's readiness to pay $285,000 over the upset price for the subsidiary stock alone. Even more important, the lot grouping played no part in the decision not to bid. Cecil Kaufmann expressly testified that he would not have had Kay bid at the auction even if the subsidiary shares were auctioned separately (J.A. 49). And when he recommended the purchase from Joel he did not know how the stocks would be auctioned (J.A. 46-48). Finally, considering that the lot grouping was only a mechanical matter (*supra*, pp. 4-5, 7), it should have been child's play to have had the grouping changed by application to the temporary administrator or the Surrogate. Yet Cecil made no effort in that direction and was not even interested enough to ascertain how the securities were grouped (J.A. 47).

The last proof of bad faith is that Kay's board of directors approved the purchase from Joel without even asking the natural question of why Kay, if it wanted the subsidiaries' stock, had not bought the stock at the auction (J.A. 70).

2. *Claimed Countervailing Considerations.*

None of the matters relied on by appellants is sufficient to raise a genuine issue regarding the motive of Cecil and Hirshman.

Cecil claims in his brief that he showed that his loyalty to Kay was superior to his attachment to Joel because he declined Joel's initial proposal to trade the subsidiaries' stock for shares in Kay itself (C. Br. 20). This triviality is defeated by Cecil's deposition testimony that the declination was prompted not by a supposed (not to mention implausible) theory that it was to Kay's advantage to pay in cash rather than in stock, but solely by the impracticality of an exchange of stock, Kay's lawyers having said of previous requests that "it would be too complex in underwriting and all the rest of it" (J.A. 36).

Appellants rely on the principle that Delaware law respects the business judgment of financially disinterested directors, a description which fits all members of Kay's board except Joel. Appellants themselves recognize that the predilection in favor of the directors is overcome by a sufficient indication of bad faith or fraud (J. Br. 28; C. Br. 12; and see *supra*, p. 27). The Delaware courts have held, for example, that they will defer to a valuation decision by a board of directors only if "a reasonable man, fully informed and acting in good faith" could consider that the corporation received adequate consideration for the price it paid. *Gottleib v. Hayden Chemical Corp.*, 91 A.2d 57 (Del. 1952); *Saxe v. Brady*, 184 A.2d 602, 610 (Del. Ch. 1962). They have also held that a gross disparity between price and value is prima facie evidence of fraud (*supra*, p. 28). Here there is such a disparity; and since it is totally unexplained, the business judgment rule is of no avail.

Appellants have supplied no evidence of the considerations which induced Kay's directors to buy the subsidiaries' shares at the price they did. It is irrational to defend their decision, so questionable on its face, as a reasonable "business judgment" without disclosing the reasons for the decision. There is no Delaware doctrine which requires a court to be blind.

3. *The Correctness of Summary Adjudication of the Illegitimate Motive.*

The only reasonable inference from the evidence we have just analyzed is that Cecil Kaufmann and Hirshman had the wrongful motive attributed to them by Judge Hart. It follows that the summary judgment is correctly founded on the scheme theory, as well as on the other two theories which do not require a determination of motive. *Supra*, p. 10.

Joel Kaufmann argues that there is a decisional rule that motive cannot be determined by summary judgment (J. Br. 23-27), and Cecil and Hirshman arrive at the same result by insisting that they should be permitted to testify about their motives in a full trial, so that "their demeanor can be evaluated before a final judgment is passed upon them" (C. Br. 21).[25]

The contentions are unsound. In a clear enough case, motive, intent and other mental states may be determined by summary judgment. *Washington Post Co. v. Keogh*, 125

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[25] Joel Kaufmann is mistaken in assuming that a trial, if held, would be before a jury (J. Br. 23, 27). None of the parties made a jury demand within the allowable time and hence all waived trial by jury. Rule 38, Fed. Rules Civ. Proc. Moreover, since the cause of action is of an equity nature (breach of trust), a jury trial could not rightfully have been demanded. *Ross v. Bernhard*, 396 U.S. 531 (1970).

[26] The cited decisions discuss *Poller v. Columbia Broadcasting System*, 368 U.S. 464 (1962), and *White Motor Co. v. United States*, 372 U.S. 253 (1963), relied on by appellants.

U.S. App. D.C. 32, 365 F.2d 965, 967-8 (1966); *Bond Distributing Co. v. Carling Brewing Co.*, 32 F.R.D. 409, 415 (D. Md. 1963), aff'd, 325 F.2d 158 (4th Cir. 1963);[26] *supra*, pp. 10-11. Cf. *First National Bank v. City Service Co.*, 391 U.S. 253, 285-86 (1964). None of the cases cited by Joel (J. Br. 24-28) hold or say that summary judgment in favor of a plaintiff is inevitably precluded whenever a defendant's motive is involved. Some of Joel's cases hold that a defendant may not get a summary judgment in his favor in a prima facie fraud case merely by his affidavit that he acted in good faith. Of course, that is not this situation.

III. THE DAMAGES AGAINST CECIL KAUFMANN AND HIRSHMAN WERE CORRECTLY ASSESSED.

Cecil Kaufmann and Hirshman argue that the amount of the judgment against them was not correct and cannot properly be determined from the existing record (C. Br. 22-25).[27] The judgment (J.A. 185) is against the three appellants jointly and severally and is in an amount equal to Joel's profit on the sale to Kay plus interest from the dates on which he realized the profit by receiving payment from Kay.

The first prong of appellants' argument is that Joel realized no profit on the sale because his will litigation expenses were a cost of acquisition (C. Br. 23). We have previously dealt with this untenable thesis. *Supra*, p. 25.

Cecil and Hirshman next assert that since they did not profit from the alleged fraud on Kay, they are not liable in the amount of Joel's profit, but only to the extent of actual loss to Kay. This, they say, is the difference between the amount it paid and the "true worth" of the stock,

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[27] As appell~~ees~~ANTS recognize (C. Br. 25), if their argument prevails the judgment of liability should be retained, but the case should be remanded (as to Cecil and Hirshman only), for a redetermination of damages. Rule 56(a) and (c), Fed. Rules Civ. Proc.

which latter figure is allegedly not established by the present record (C. Br. 23-24).

There are two answers to this contention. First, if we assume momentarily that appellants are right that the measure of damages is Kay's loss rather than Joel's profit, it does not matter. Here the record establishes that Kay's loss—i.e., the difference between the worth of the stock and Kay's purchase price—is identical with Joel's profit—i.e., the difference between the auction price and the price paid to him by Kay. For we have already seen (*supra*, pp. 29-30), that the stock was not worth more than the auction price. It may have been worth less, in which case Kay's loss was greater than Joel's profit, but Cecil and Hirshman do not and cannot complain that the judgment against them is too small.

The other answer is that appellants' legal theory is plainly wrong, and that Cecil and Hirshman are liable in the amount of Joel's profit because he is liable in that amount and they are joint tortfeasors with him.

That Joel is liable for his profits, regardless of the amount of Kay's loss, is not disputed by him and is undisputable. Appellants avoid contradicting (C. Br. 23) the principle that a fiduciary who profits from a breach of trust is liable to the cestui in the amount of his profit even if that exceeds the cestui's actual loss or damage. Indeed, the principle is too well settled to be contestable. See authorities cited *supra*, p. 14.

Equally well settled is the principle that all fiduciaries, including corporate directors, who act together in breach of their fiduciary duty are joint tortfeasors and are therefore jointly and severally liable. See authorities cited *supra*, pp. 34-35. Cecil and Hirshman do not cite any cases contrary to this principle. Instead they say that the principle is irrelevant because the "immediate question" is not whether they are liable but only the amount of their liability (C. Br. 24). What this overlooks is that the amount of the liability inevitably flows from the nature of their liability as joint

tortfeasors. As such, they are liable not only for their own breach of trust, but also for that of Joel, their joint tortfeasor. See, e.g., *Norte & Co. v. Huffines, supra,* at 1109. It is a platitude that each joint tortfeasor is liable to the same extent as the other joint tortfeasors, regardless of which of them profited.

Cecil and Hirshman next say, "Whatever abstract language the cases may employ, research discloses no decision in which a nonprofiting corporate director has himself been held liable by any measure except actual loss shown to his corporation, and there is no reason or equity in applying to such a director a restitutionary measure of recovery" (C. Br. 24). First, it is significant that they cite no decisional language contrary to the cases' "abstract language." Second, their research is faulty. They have looked only for the predictably rare case of a faithless director who personally received *none* of the loot of a joint breach of trust. They have disregarded easy-to-find cases presenting the same question—whether a faithless director is accountable for profits received only by his accomplices. These are cases, some of which were cited by us below, in which a fiduciary who made *some personal profit* from a joint breach of trust was held liable not merely for his own profit, but also for the profits received by participants other than himself. *Norte & Co. v. Huffines, supra,* at 1109; *Jackson v. Smith,* 254 U.S. 586, 589 (1921); *Marcus v. Otis,* 168 F.2d 649, 654 (2d Cir. 1948) (involving Delaware corporation).

As for Cecil's and Hirshman's appeal to "reason or equity," the short answer is that for many years the law has not found it unreasonable or inequitable to make all joint tortfeasors equally liable to their victims, leaving to the doctrine of contribution any appropriate adjustments among the malefactors. There is no basis for making an exception for tortfeasors who are corporate executives.

CONCLUSION

The judgment below should be affirmed.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

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v.
KAY JEWELRY STORES, INC., et al.,
CECIL D. KAUFMANN and SIMON HIRSHMAN,
Appellants.

No. 24,444

WALTER A. WEISS
v.
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JOEL S. KAUFMANN,
Appellant.
CECIL D. KAUFMANN, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT JOEL S. KAUFMANN

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ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANT JOEL S. KAUFMANN

Introduction

Appellee, as we understand it, seeks affirmance of the summary judgment granted in his favor on three grounds: First he argues that Joel Kaufmann's acquisition of the subsidiary shares at the public auction of June 7, 1966, violated the "purchase-for-resale" rule, citing cases that do not establish the existence of any such rule, which in any event was never even mentioned by the District Judge and would

be inapplicable even if it did exist. Second, he argues that the subsidiary shares were sold by Joel to Kay at an excessive price—a theory that, as the District Judge correctly found (Tr. 9), requires the resolution of a factual dispute about the actual value of the subsidiary shares at the time they were purchased by Kay, and that even on uncontested facts would support a judgment only to the extent of the difference between the actual value of the shares and the purchase price paid by Kay. Third, and with some lack of confidence judging from the position of the argument in the brief, appellee contends that a summary disposition of the case can be sustained on the theory—the one adopted by the District Judge in his oral opinion (Tr. 47; J.A. 184) —that the acquisition of the subsidiary shares by Joel and the subsequent sale of these shares to Kay were parts of a "scheme" to misappropriate corporate assets for Joel's personal benefit. Here again appellee has stated a plausible theory of liability, but he has not justified the use of summary procedure to settle the relevant factual issues. The existence—or non-existence—of a "scheme", as we have demonstrated in our opening brief, depends on factual findings concerning the motives and purposes of Joel and his fellow directors in the two critical transactions, and as to these matters the record discloses genuine disputes.

We will now show that there is no "purchase-for-resale" rule, that the rule would be inapplicable if it existed at all, that the "excessive price" and "scheme" theories could only succeed if inferences favorable to appellee and adverse to Joel were drawn by a trier of fact, and that summary judgment was therefore unwarranted.

1. *There is no "purchase-for-resale" rule*

Appellee's first argument is that when Joel purchased the subsidiary shares at the public auction, having previously discussed with another director the possible resale of these same shares to Kay at more than the auction price, he breached the duty of a director not to purchase property

for himself with intent to resell it to his corporation at a profit. Any profit actually realized on a resale of the property to the corporation in these circumstances, so the argument continues, is recoverable from the director. These propositions are not good law, and they are not made so by the fact that in appellee's brief they are dressed up in bold type and packaged as the "purchase-for-resale" rule.

We agree, of course, that a director's status as a fiduciary demands of him the utmost good faith and undivided loyalty in his relation to the corporation. That very general principle is the ultimate source of the various and somewhat less general rules and doctrines pertaining to director obligations that have been developed by the courts. As we read the authorities, the situations in which special rules apply may conveniently be divided into four broad classes. The first class consists of those cases in which a director converts corporate funds to his own personal advantage, in which case he is required not only to return the misappropriated funds but also to account to the corporation for any profits attributable to his use of those funds. See, *e.g.*, *Marcus v. Otis*, 168 F.2d 649 (2d Cir. 1948). Obviously our case is not of this type since, as appellee concedes, Joel used his own funds and credit to finance the acquisition of the subisdiary shares at the public auction. The second class consists of cases in which the director acts on behalf of the corporation as its agent. Here the rule is that the director cannot reap any personal profits from the transaction, but must disclose and account to the corporation for all such profits. See, *e.g.*, *Wilshire Oil Co. of Texas v. Riffe*, 381 F.2d 646 (10th Cir. 1967), *cert. denied*, 389 U.S. 822; *Irving Trust Co. v. Deutsch*, 73 F.2d 121 (2d Cir. 1934); *Heit v. Bixby*, 276 F. Supp. 217 (E.D. Mo. 1967). This is commonly referred to as the "secret profits" rule, but that is something of a misnomer since the director is bound to turn over to the corporation the disclosed as well as the undisclosed profits. See *Heit v. Bixby*, *supra*. Here again our case is clearly not of this second type since it is undisputed that Joel was acting on his own

behalf and not as agent on Kay's behalf when he acquired the subsidiary shares at the public auction. Into the third broad class fall the cases involving contracts between a director and his corporation, and in these situations—because of the potential for overreaching—the rules of general application are that the director must demonstrate the fairness of the transaction, and that any provision of the contract as to which fairness is not shown will be set aside. See, *e.g., Teren V. Howard*, 322 F.2d 949 (9th Cir. 1963); *Mayflower Hotel Stockholders Protective Committee v. Mayflower Hotel Corp.*, 89 U.S. App. D.C. 171, 193 F.2d 666 (1951). We agree that these principles have relevance to the transaction in which Joel sold the subsidiary shares to Kay—and we will deal with them in our discussion of appellee's "excessive price" theory—but they are plainly not relevant to Joel's acquisition of the shares at the public auction. We come, then, to the fourth class of cases in which the courts have had occasion to examine the implications of a corporate director's fiduciary status. Here are found the cases, including all the ones cited by appellee as proof of the "purchase-for-resale" rule, in which a director seized as his own a business opportunity that—while it may or may not have come to him by reason of his association with the corporation—was in the line of the corporation's interest and activity. In these situations the courts have applied the corporate opportunity doctrine, holding any property acquired by the director to be impressed with a constructive trust and requiring him to turn that property over to the corporation at cost, or, if no property was involved or none remains, then requiring the director to account to the corporation for his net profit. See, *e.g., Norte & Co. v. Huffines*, 304 F. Supp. 1096 (S.D. N.Y. 1968), *aff'd*, 416 F.2d 1189 (2d Cir. 1969), and other cases cited in Brief for Appellee, p. 14. Appellee conceded at oral argument in the District Court (Tr. 16), and concedes again in his brief (pp. 21, 32 n. 19), that the opportunity to bid for the subsidiary shares at the auction was not a corporate one since Kay rejected it after notice and consi-

deration. The supposed "purchase-for-resale" rule is found in the wreckage left by this correct concession.

Ordinarily, where a director buys property for himself intending to resell it to his corporation, and does in fact resell it, a corporate opportunity will have been involved. That is, the corporation's ultimate acquisition of the property will ordinarily indicate that it had an interest in it in the first place, in which case the director always held the property as constructive trustee. But because purchase and resale transactions will often have evidentiary value on the issue of corporate opportunity, they certainly do not establish a violation of a director's fiduciary duties where other evidence indicates—as it concededly does here—the absence of such an opportunity.

All the cases relied on by appellee involve corporate opportunity situations. In *Norte & Co. v. Huffines, supra*, for example, the delinquent directors recommended to their corporation (Defiance), whose board they controlled, the acquisition of all the outstanding stock of another corporation at $70.51 a share at the same time they were secretly and successfully negotiating a private purchase of a large block of that other stock at $20.94 a share. The shares purchased by the directors at the low price were among the shares subsequently acquired by the corporation at the high price. The court held that the directors could not capitalize on the offer to purchase at the $20.94 price but were bound to turn that opportunity over to the corporation. The directors were therefore held to account for the difference between the net proceeds of the sale of their stock to Defiance at $70.51 a share and the net cost to them at $20.94 a share. It was clear that Defiance would have wanted to bid at the lower price had it know of the opportunity to do so and had its board not been dominated by interested directors, whereas of course Kay made an informed decision not to bid at the auction. And it is clear that, unlike Joel, the responsible Defiance directors had no pre-existing interest to protect in the property they purchased, failed to disclose their dealings to their corpora-

tion, and had voting control on their corporation's board. Similarly, in *New York Trust Co. v. American Realty Co.*, 244 N.Y. 209, 155 N.E. 102 (1926) and *Bliss Petroleum Co. v. McNally*, 259 Mich. 569, 237 N.W. 53 (1931), two cases that in appellee's view we misconstrued in our opening brief, purchase and resale transactions were considered to be relevant only insofar as they indicated the existence of a corporate opportunity of the kind that appellee admits was never presented to Joel. So far as concerns appellee's reference to secondary source materials, the treatise relied on says only that it "seems" to be the rule that a director will be treated as a constructive trustee where he purchases property for the purpose of selling it to the corporation, and for this seeming rule cites only *Parker v. Nickerson*, 137 Mass. 487 (1884), a case holding only that a corporate officer is not accountable for the difference between his own cost and the selling price to the corporation where he was under no obligation to purchase the property for the corporation in the first instance. 3 Fletcher, *Cyclopedia of Corporations* § 950 at 450.

Beyond the lack of any persuasive authority for a separate "purchase-for-resale" rule, there is no need for such a rule to protect the corporation or its stockholders. If a director is using his personal funds and acting for himself to acquire property in which the corporation has no interest, or—as here—to acquire property in which the corporation would have an interest only in other circumstances, there is no danger of divided loyalties or profiteering by the director at the corporation's expense. The corporation simply has no interest in the matter. In the event the property is subsequently sold to the corporation, the stockholders are fully protected by the rule—applicable here to the sale of the subsidiary shares by Joel to Kay—that a director must demonstrate the fairness of his transactions with the corporation. Indeed, as we understand appellee's argument, Joel would not have breached any fiduciary duty had he retained the subsidiary shares or had he sold them—even at a profit—to some buyer other

than Kay. So the focus is on the ultimate sale of the shares to the corporation, and as to this transaction the relevant protective principle is that the terms must be fair.

2. *The "purchase-for-resale" rule would be inapplicable even if it did exist*

Even if there were a "purchase-for-resale"rule, and even if it were thought to cover Joel's conduct despite his expressed intention to purchase the subsidiary shares whether or not he could resell them to the corporation (J.A. 174), in our view the rule would be inapplicable for two reasons. First, putting aside for a moment appellee's contention that there was a "scheme" to misapply corporate assets, the sale of the shares to Kay was approved by an informed and disinterested board of directors. In these circumstances an individual director is not accountable for profits made on property that he purchased and then sold to the corporation. *In Re Lerch's Estate*, 399 Pa. 59, 159 A.2d 506 (1960). And second, Joel had a pre-existing interest in the subsidiary shares and might have suffered a serious personal loss if he had been precluded from acquiring the subsidiary shares for his own account at the auction. See *Twin Lick Oil Co. v. Marbury*, 91 U.S. 587, 590-591 (1875) (holding that a director was free to bid at a foreclosure sale on property given as security for a loan made by that director to his corporation).

We have recounted in our opening brief (pp. 4-7) the sequence of events leading up to the public auction at which the subsidiary shares were sold. Under Robert Kaufmann's penultimate will—the one that was pending for probate at the time the public auction was held—Joel's two sons had a 50 percent interest in the residuary estate. The outcome of the auction was therefore a matter of natural family concern to Joel. If he was required to abstain from the bidding, the shares could be sold to a third person at the minimum upset price and the estate thus shortchanged to the degree that this price was lower than the fair value of the shares.

But if as we contend he was permitted to bid, he could force the auction price up to what he considered the fair value of the shares or, if there were no other bidders, he could buy in the shares himself at the minimum upset price and hope to resell them latter at a higher price reflecting their real value. Again, he could not hope to recoup his litigation expenses by selling the shares to Kay at an unfair price because the terms of that transaction would always be reviewable as to fairness. But he could legitimately hope that the fair price at which the subsidiary shares might be resold to the corporation would be greater than the minimum upset price that the temporary administrator was authorized to accept at the auction sale.

Appellee seems to believe (Brief pp. 23-25) that we are asserting some sort of right on the part of Joel to sell interests or assets in Robert's estate. But our point is simply that the opportunity to bid for the shares at the auction—an opportunity that never would have existed in the first place but for Joel's large expenditures of his own time and money in the will contest—was one that Joel was entitled to use to the best advantage for his family, by selling the shares to Kay at a fair price if he so elected.

3. *Whether Kay paid an excessive price for the subsidiary shares is a disputed question of fact*

Appellee argues (Brief p. 29) that the price for which the subsidiary shares were sold to Joel at the auction must be considered as establishing the fair market value of the shares as of the later date when they were sold to Kay, since there were no events in the interval between the two transactions that could have significantly influenced value. Thus he reasons—this is the "excessive price" theory—that the price paid by Kay was unreasonably high to the full extent that it exceeded the price paid by Joel at the auction. It could as well be reasoned, it seems to us, that the price paid by Kay must be deemed to establish the fair

market value of the shares, and that Joel found a bargain at the auction. In the abstract there is nothing to choose between these two arguments, but there is no need to choose since, as the District Judge recognized (Tr. 9), the fair value of the shares involved in the two transactions is a disputed factual issue that can only be resolved by trial.

There was a time when it suited appellee's interest to take a very different position than he is now taking with respect to the fair value of the subsidiary shares. At the Surrogate's hearing prior to the auction, appellee (who stood to benefit from the proceeds of the auction since he, along with Joel's two sons, was a residuary legatee under the will then pending for probate) contended that the shares to be offered were worth at least $500,000.[1] Moreover, after the Surrogate fixed an upset price for the shares (which was a minimum price that did not purport to represent an appraisal of market value), appellee gave a further indication of what he thought the shares were worth by trying to interest other bidders in the auction. Any competitive bidding would obviously have driven the price upwards beyond the upset level. Now, however, with new purposes to be served in his role as dissident minority stockholder in Kay, appellee makes the wholly inconsistent claim that the shares were never worth a penny more than the upset price.

Appellee makes much of the fact (Brief p. 30) that the price paid by Kay for the subsidiary shares was 81 percent of their book value, while at the same time Kay's own shares were trading on the American Stock Exchange at a price equal to only 40 percent of their book value. However, this fact could have relevance only in the context of the earnings records and financial condition of the various companies—data that was not developed in this case. Obviously Kay's own stock could be expected to

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[1]The auction offering included some shares in companies other than Kay subsidiaries (see Brief, pp. 5-6). But less than one-third of the $299,388 upset price was attributable to the purchase of these non-subsidiary shares.

reflect the overall performance and promise of its many subsidiaries, the unprofitable as well as the profitable ones. On the other hand, the stock of the separate companies could be expected to reflect only their own, possibly better-than-average performance and prospects. Thus without data and analysis bearing on the state of the individual companies whose stock was involved, the fact that Kay paid a high percentage of book value for their shares is meaningless. But even if that fact in isolation did have some tendency to prove that the price was excessive to some extent, it certainly is not conclusive on that point nor could it remotely justify a finding, absent which the summary judgment cannot be sustained on this theory, that the price was excessive to the full extent—$192,000—that it differed from the upset price paid by Joel at the auction.

Underlying appellee's "excessive price" theory is the assertion that under Delaware law a director, where he is free to sell property to his corporation at a profit, may not charge more than the property is reasonably worth. But the only case cited by appellee does not support that proposition, but rather holds that absent fraud the approval of an informed and disinterested board of directors establishes the validity of the transaction. *Lipkin v. Jacoby*, 202 A.2d 572 (Del. Cl. 1964). However, even if appellee has correctly stated the governing principle,[2] the facts that Joel did make

[2] It is perfectly clear that under existing Delaware law, the premise of the "excessive price" theory is false. In substance, appellee is asserting that as a matter of Delaware law a director is liable based upon a hindsight determination that the price paid exceeded the property's fair value even assuming that the transaction was approved by a disinterested board of directors acting in good faith and within the scope of their business judgment. Appellee then proceeds to argue that the price paid did in fact exceed fair value in the amount it differed from the auction price. However, under Del. Corp. Law § 144 (a) transactions between corporations and their directors are not void or voidable on this account if, *inter alia, either* the transacting director discloses his interest and "the board . . . in good faith authorizes the contract or transaction by a vote sufficient for such purpose without counting the vote of the interested director or direc-

full disclosure, that the acquisition of the subsidiary shares was approved by a disinterested board, and that the sales price was considerably less than the book value of the shares, are strong evidence that the shares were worth what Kay paid for them. The record might contain still stronger evidence on this point had appellee not presented the "excessive price" theory as an afterthought in the reply memorandum he filed a few days before the hearing in the District Court. The only evidence on the other side is that Joel earlier bought the subsidiary shares at a one-bidder public auction for a minimum price that did not purport to represent actual value. In this posture there obviously was a factual dispute precluding summary judgment on the "excessive price" theory. And that would be true even if we have the ultimate burden on the issue of fair value, since burdens of this kind are only a means of allocating requirements of proof at the trial and are not a guide to the settlement of factual disputes before trial. See *Dyer*

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tors; *or* . . . the contract or transaction is fair as to the corporation . . ." (emphasis added). By the terms of the statute, the fairness test is not applicable as such where the board of directors acts in good faith. Or, in other words, the fairness of the transaction is *established* by the disinterested directors' good faith approval. It is thus clear that the "excessive price" theory of Weiss is without legal merit in Delaware today and Weiss explicitly concedes that Delaware law is controlling on substantive issues (Brief for Appellee, p. 12 n. 8).

The Delaware statute in its present form took effect on July 3, 1967, after the Company had acquired Joel's stock but before Weiss made his demand upon the directors and instituted the present suit. None of the commentary or legislative history we have discovered explicating the 1967 revision suggests that Section 144 altered pre-existing Delaware law in making good faith approval by a disinterested board conclusive; and accordingly it is presumed that the revision does not alter but rather reflects pre-existing law. See *United States* v. *Ryder*, 110 U.S. 729, 740 (1884); Barron, *The Judicial Code, 1948 Revision*, 8 F.R.D. 439, 445-448 (1948), and post-*Ryder* cases cited therein. Whatever the law may have been in other states, Delaware decisions prior to 1967 did not apply an abstract "fairness test" where the transaction was approved by a disinterested board of directors acting in good faith and not dominated by the transacting

v. MacDougall, 201 F.2d 265, 268 (2d Cir. 1952), holding that even where a party against whom summary judgment is sought has the trial burden on a particular issue, the moving party has the burden of demonstrating that no genuine factual dispute exists with respect to that issue.

4. *Whether there was a "scheme" to enrich Joel at Kay's expense is also a disputed question of fact*

Only toward the end of his brief does appellee make his defense on the ground on which the District Judge granted summary judgment—that the purchase of the subsidiary shares at the public auction and their subsequent sale to Kay were parts of a "scheme" concocted by Joel Kaufmann, Cecil Kaufmann, and Simon Hirshman to loot the corporation in order to reimburse Joel for personal litigation costs that were unrelated to the corporation's business. Appellee concedes (Brief p. 33) that summary judgment can only be sustained on the basis of this "scheme" theory if undisputed facts show that the three appellants were all motivated in their actions by a desire to benefit Joel at the corporation's expense and, at least in the case of Joel himself (Brief p. 33, n. 21), only if he knew that the others were acting out of this illicit motive. Appellee should also have conceded, it seems to us, that the "scheme" theory requires an additional finding that the remaining directors of Kay who voted to acquire Joel's shares were actuated by improper motives and thus were parties to the alleged conspiracy to divert the corporation's funds.[3] This finding is required because these remain-

director. Appellee cites only the *Lipkin* case to support his assertion that such a test was in force in Delaware prior to 1967. However, a reading of that decision shows that it does not lend itself to this construction but, on the contrary, makes it apparent that the court was principally concerned with the good faith and disinterested status of the majority of the board which approved the transaction. See 202 A.2d at 575-576.

[3]As noted in our opening brief (p. 11), at the time of the relevant transactions and meetings Kay's board of directors consisted of ten persons, three of whom were neither employees nor officers of the

ing directors approved the transaction knowing that Joel's asking price reflected his litigation expenses and because there is no evidence or even suggestion that they were dominated by the Kaufmanns, who by the way did not even vote on the transaction.

Apart from Joel, all the directors of Kay were disinterested in the sense that they had nothing to gain by paying an inflated price for the subsidiary shares. Indeed, all the inside directors, including Cecil Kaufmann and Simon Hirshman, held substantial stock in Kay and thus had something to lose if the corporation overpaid. Why under these circumstances the directors would have deliberately sacrificed the corporation's interests to accommodate Joel is a question on which appellee's brief is silent. That for some unexplained reason they made such a sacrifice, however, is asserted to be established by undisputed facts, or inferences from those facts. Why else, so it is argued (Brief for Appellee, pp. 36-41), unless there was a scheme to injure the corporation, would the directors have agreed to such a high price for the shares, or accepted Joel's formula for calculating his acquisition costs so as to include his litigation expenses, or failed to cause the corporation to bid in its own right at the public auction. With respect to the first and second of these facts, it could as reasonably be inferred that the directors thought the subsidiary shares worth having at Joel's price, however that price may have been arrived at by Joel. In this view the price paid by Kay may still have been too high, but if so—and we have seen that the fair value of the shares is itself a contested issue

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corporation. We also noted in our opening brief (pp. 11-14) that, contrary to appellee's assertion (Brief p. 18) that "Joel had a prearrangement with his fellow directors that Kay would purchase the stock from him if he bought it at the auction," the purchase of the shares was not approved prior to the meeting that was held on July 1, 1966 following the public auction. Indeed, the record does not reflect that prior to the auction Joel discussed the prospective sale of his shares with any Kay directors except Cecil Kaufmann and Simon Hirshman.

of fact—that might indicate mistaken business judgment but it would not indicate bad faith. As to the third fact recited—Kay's failure to bid at the auction—Cecil Kaufman has said that he thought bidding inadvisable because he feared competitive bidding. Appellee has made it clear that he considers that decision to have been a poor one. But calling it a badge of fraud is another matter, involving just the kind of factual determination and appraisal of credibility that are disallowed for purposes of summary judgment. Furthermore, having conceded that as to Joel the "scheme" theory of liability is tenable only if he knew that the disinterested directors were acting in bad faith, appellee points to no evidence whatever that Joel possessed such knowledge.

Appellee cites *Washington Post Co. v. Keogh*, 125 U.S. App. D.C. 32, 365 F.2d 965 (1966) and *Bond Distributing Co. v. Carling Brewing Co.*, 32 F.R.D. 409 (D. Md. 1963), *aff'd*, 325 F.2d 158 (4th Cir. 1963) for the proposition that "motive, intent and other mental states may be determined by summary judgment." (Brief pp. 42-43). But both these decisions recognize that it is the rare case, in which only one inference can reasonably be drawn from the undisputed facts, where summary judgment will be appropriate on an issue of subjective state of mind. In our case, the facts that Kay's board of directors was disinterested, undominated, and fully informed in connection with the relevant transactions are alone sufficient to support not only a permissible but a compelling inference that there was no "scheme" to subordinate the interests of the corporation.

Conclusion

For the reasons given above and in our opening brief, the judgment should be reversed and the case remanded for trial.

Respectfully submitted,

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IN THE

UNITED STATES COURT OF APPEALS

FOR THE DISTRICT OF COLUMBIA CIRCUIT

No. 24,443

WALTER A WEISS

v.

KAY JEWELRY STORES, INC., et al.,
CECIL D. KAUFMANN and SIMON HIRSHMAN,
Appellants.

No. 24,444

WALTER A. WEISS

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JOEL S. KAUFMANN,
Appellant.

CECIL D. KAUFMANN, et al.

ON APPEAL FROM THE UNITED STATES DISTRICT COURT FOR THE DISTRICT OF COLUMBIA

REPLY BRIEF FOR APPELLANTS CECIL D. KAUFMANN AND SIMON HIRSHMAN

United States Court of Appeals
for the District of Columbia Circuit

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*Cases and authorities principally relied upon are marked with an asterisk.

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The most significant fact about the brief of appellee Weiss is that, in principal part, it seeks to defend the summary judgment below on two different grounds neither of which was accepted by the district judge and one of which he explicitly rejected. These alternative theories are untenable, but even if the contrary were true, they have no proper application to Cecil or Hirshman. As for the quite different ground actually adopted by the district judge, it remains fundamentally defective as to both liability and damages and Weiss' curative attempts fall short of the very requirements he concedes must be met.

I. WEISS' "ALTERNATIVE THEORIES" ARE WITHOUT MERIT AND ARE IN ANY EVENT INAPPLICABLE TO CECIL AND HIRSHMAN.

The district judge's grant of summary judgment rested solely upon a determination that Cecil, Joel and Hirshman had engaged in a "scheme" for the purpose of benefiting Joel in disregard of the Company's interests in the transactions at issue (J.A. 184). This strictly factual conclusion as to the appellants' state of mind was improper on summary judgment, as the record evidence and governing decisions set forth in appellants' opening briefs showed. Through his alternative theories, Weiss has sought to avoid the infirmities of the decision below by seeking to premise liability of the appellants on essentially per se grounds that do not depend on whether the acts done were performed in good faith.

Thus, Weiss alleges that there is a settled, invariable rule that a director may not resell to his company at a profit property which he purchased with the intention to make such a sale (Weiss Br. 14-28), and Weiss asserts that a second per se rule was broken on the assumption that Joel sold the stock to the Company at a price in excess of its fair value to the Company (Weiss Br. 28-32). This is, of course, a 180 degree change in direction; while the district judge determined that appellants' actions (not otherwise found by him to be unlawful) were tainted by a bad faith purpose, Weiss' two theories posit that particular acts done were unlawful per se regardless of whether they were performed in good faith.

This reorientation cannot be smoothed over by Weiss' general assertion that courts sometimes uphold judgments on grounds not relied on by the lower court (Weiss Br. 10). In this case, the district judge did not accept either alternative per se theory as a basis for summary judgment and, in fact, flatly rejected the excess price theory in the course of oral argument on the self-evident ground that the value of the stock was a disputed issue of fact (Tr. 9-10). These alternative theories, therefore, are attempts by Weiss to have this

court rule that the district judge erred in not granting summary judgment.[1]

Accordingly, if this court agrees that the district judge erred by determining on summary judgment that appellants acted in bad faith, we believe it would be entirely appropriate for this court to remand this case for further proceedings without reaching Weiss' alternative theories. However, it can readily be shown that under settled law the theories can provide no basis for sustaining the liability of Cecil and Hirshman, even on the false assumption that the theories are themselves correct.

Weiss seeks to make these alternative theories the basis for summary judgment against Cecil and Hirshman by means of a two-step argument. He argues first that Joel breached his fiduciary duty as a director both because he violated the supposed "purchase for resale" rule and because he allegedly sold the stock to the Company at a price in excess of its value (Weiss Br. 13-32). Weiss then seeks to extend liability for these asserted violations to Cecil and Hirshman on the theory that they are equally liable because they "participated" in the transactions even if it be assumed that they acted in good faith in doing so (Weiss Br. 34-35).

It is crucial to Weiss' argument that good faith participants in a fiduciary's breach of trust be liable as a matter of law. For, if the liability of the participants depends on their acting in bad faith, Weiss' alternative theories themselves depend, so far as Cecil and Hirshman are concerned, on the validity of the district judge's finding that appellants acted in bad faith and thus would be no alternative at all. Accordingly, Weiss explicitly alleges that on his participation theory

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[1]Of course, it is settled law that the denial of summary judgment is not subject to appeal in advance of trial. See 6 Moore, Federal Practice ¶ 56.21 [2] (2d ed. 1956).

"purity of motive" on the part of Cecil and Hirshman is legally "irrelevant" (Weiss Br. 35).[2]

The conclusive flaw is that the law does not sanction any such theory of liability: liability for "participating" in a breach of trust by fiduciary requires *both* that the participant sought to be held liable have participated and that he have been aware that the conduct constituted a breach of trust, *i.e.*, he must have acted in bad faith. The principle is concisely stated in 4 Bogert, *Trusts & Trustees* §901, at 209 (2d ed. 1962) (footnotes omitted):

> "The wrong of participation in a breach of trust is divided into two elements, namely, (1) an act or omission which furthers or completes the breach of trust by the trustee; and (2) knowledge at the time that the transaction amounted to a breach of trust, or the legal equivalent of such knowledge."

The same principle is affirmed in the *Restatement*, in the decisions of the courts, and even in authority provided by Weiss regarding the wrong of "participation" in a breach of trust.[3] This principle is fully in accord with settled Delaware law, cited in Cecil and Hirshman's opening brief (pp. 11-12), that a director who has no personal stake in

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[2]While necessarily and explicitly assuming that Cecil and Hirshman's motive is irrelevant on this participation theory, Weiss suggests a certain lack of confidence in his assumption by coloring his argument directed to the same theory by rhetoric which suggests a bad motive: e.g., "known-malfeasance," "aided, abetted," "fraudulent transaction" (Weiss Br. 34-35).

[3]See, e.g., Restatement (Second), Trusts § 326 & comment a (1959); Nathan v. Hudson, 376 S.W.2d 856, 863 (Tex. Civ. App. 1964); Pendleton v. Williams, 198 So.2d 235, 237 (Miss. 1967); Scott, "Participation in a Breach of Trust," 34 Harv. L. Rev. 454, 455 (1921). The very passage cited by Weiss in 3 Fletcher, Cyclopedia Corporations §950, at 451-52 (1965) is expressly concerned with liability of participating directors who have "conspired," i.e., acted with unlawful intent. None of the cases or authorities cited by Weiss (Weiss Br. 34-35) asserts that there is liability for those who participate in good faith.

and obtains no profit from an alleged unlawful transaction can be held liable only upon a showing of bad faith or negligence.

Naturally if Cecil and Hirshman believed that Joel's acquisition and resale to the Company involved a breach of a fiduciary duty or believed the price paid by the Company exceeded the value of the stock to it, the necessary element of bad faith could be present and liability could follow. Weiss does contend that bad faith is demonstrated in a number of ways, including allegations that Cecil and Hirshman necessarily believed the price paid was excessive. This contention, however, makes the participation theory no alternative to the district judge's determination that appellants acted in bad faith but rather dependent upon it and subject to the objection that bad faith was improperly determined on summary judgment.

Since the participation theory advanced by Weiss is without merit, there is no reason to discuss at length the question whether Joel's acts were per se violations of his fiduciary duty. However, it is Cecil and Hirshman's position that no such violations occurred, and on this assumption Weiss' alternative theories cannot succeed against them for this additional reason. To avoid repetition, Cecil and Hirshman rely principally on Joel's briefs as establishing that no such violations occurred and limit themselves to the two following observations.

In response to Weiss' argument that Joel's acquisition violated the alleged purchase for resale rule and the corporate opportunity doctrine (Weiss Mem. 7-8) appellants responded *inter alia* with precedents showing that a director who has a pre-existing interest in property may acquire that property without subordinating his own interests to those of the corporation as he might otherwise be required to do. This qualification rests on the unfairness of requiring the director to abandon his own interest in favor of the corporation when that interest is pre-existing and there remains a board of directors fully able to protect the corporation in the face

of the divergent interest. While Weiss' brief denies the existence of this proposition, it fails to distinguish the precedents on which it rests or to provide any authority inconsistent with it.[4]

Little need be said about Weiss' other per se argument that Joel breached his fiduciary duty by selling the stock to the Company for more than it was actually worth. The district judge himself recognized this to be a disputed issue of fact (Tr. 9-10) and obviously it would be subject to expert testimony. There is virtually no proof that the stock was worth less than the Company paid for it, let alone proof so conclusive as to allow summary judgment on this question.[5]

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[4]The leading case cited by Cecil and Hirshman in their memorandum below (p. 11) and their opening brief (p. 8) is Twin-Lick Oil Co. v. Marbury, 91 U.S. 587 (1875), where the Court held that a director could foreclose on a mortgage and take from his corporation property which it owned and sought to regain. Such a step, at least as adverse to corporate interests as the preemption of a corporate opportunity or a purchase for resale at a profit, was held by the Court to be justified because of the pre-existing mortgage interest; "for, if [the director] could not bid [the property in at the mortgage sale], he would have been deprived of the only means which his contract gave him of making his debt out of the security on which he had loaned his money." Id. at 590-91. Similarly, if Joel could not have bid for the stock at the public auction, he would have been denied the only means to protect his children's and his own pre-existing interest in the proceeds and, once it is conceded that he could obtain the property adversely to the Company, there is no reason why he should not be able to anticipate a resale to the Company at a higher price where it would serve their mutual advantage.

[5]Weiss initially relied on the Surrogate's upset price and the auction itself to fix the value of the stock, but these inferences are inconclusive since the Surrogate disclaimed any attempt to determine fair value and only one bidder appeared at the auction (see Cecil Br. 17-18). Weiss now supplements the argument by asserting that the parent Company's stock sold for a smaller percentage of book value than the percentage of book value paid by the Company for the subsidiaries in question (Weiss Br. 30). The infirmity in this equation is that the price of the parent at best represents the value of *all* its subsidiaries taken together and shows nothing whatever about the value of the particular subsidiaries whose stock was purchased.

II. THE "BAD FAITH" DETERMINATION ON SUMMARY JUDGMENT IS IMPROPER AND THE THEORY OF DAMAGES EMPLOYED AS TO CECIL AND HIRSHMAN IS ERRONEOUS AND WITHOUT PRECEDENT.

The opening brief of Cecil and Hirshman demonstrated that the district judge's determination that they had acted in bad faith could not properly be made on summary judgment. In particular, there were no admissions of bad faith or other such direct evidence of bad faith; the district judge had no opportunity to appraise appellants' credibility in oral testimony; explanations of appellants' acts consistent with good faith were provided; and the controlling precedents repeatedly caution that a determination of bad faith is not normally to be made on summary judgment. Cecil Br. 13-22.

Weiss' discussion of the bad faith issue is in substance nothing more than a series of quarrels with the soundness of the particular explanations given by Cecil and Hirshman for their acts. Even if Weiss' criticism were right in every instance—which is certainly not so—the most this could ever prove is that appellants' business judgment was faulty or inaccurate. What cannot be conclusively inferred from their behavior is that the appellants were actually motivated by concealed bad faith; and until the appellants have testified in court and their credibility has been gauged by the trier of facts, bad faith remains a disputed question of fact precluding summary judgment.[6]

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[6]Weiss could not have avoided this obstacle even if he had sought to pitch his case upon a negligence theory rather than a charge of bad faith. It is well settled that negligence turns upon an appraisal of all the circumstances and generally requires a plenary trial. E.g., Gross v. Southern Ry., 414 F.2d 292, 296 (5th Cir. 1969). Also, under the governing substantive law of Delaware, it would take the most extreme negligence to impeach the directors' honest business judgment (see Cecil Br. 12). Finally, if liability were imposed on Cecil and Hirshman based on a finding of negligence, then clearly the measure of their liability would be damages (if any) actually suffered by the Company from the particular acts found negligent.

Several points are invited by the nature of the criticism advanced by Weiss. Most importantly, various of the factual predicates for these criticisms are either wrong or themselves disputed issues; and, in either event, reliance on such predicates does not remove but rather emphasizes that there are disputed issues of fact precluding summary judgment. Merely as an example, Weiss seeks to impeach the Company's decision to purchase the stock from Joel rather than by bidding at the auction; to do so, Weiss relies heavily on the assumption that Cecil believed Joel would not bid against the Company (Weiss Br. 38-40). Yet, Cecil testified that Joel said he would bid against "anybody" (J.A. 49). Joel essentially confirmed this fact (J.A. 100), and Cecil explicitly denied under oath the suggestion that he believed Joel would not bid against the Company (J.A. 51).[7]

Weiss similarly employs the circular technique of seeking to prove a disputed issue of fact, not by independent evidence, but by assuming the truth of another proposition of fact equally in dispute. For instance, in arguing about whether the Company had legitimate reason to purchase the stock from Joel, Weiss repeatedly relies upon the assumption that the price paid was "exorbitant" (Weiss Br. 36) and "excessive" (Weiss Br. 38). This permits an argument that the directors could not have genuinely believed that the benefits of the acquisition would compensate the Company for the cost. But the question of the stock's value is itself a disputed issue which the district judge properly refused to resolve in favor of Weiss on summary judgment,

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[7]Weiss ignores all of the testimony just cited and relies on a statement by Cecil appearing at J.A. 50. Examination of that statement reveals that it was made in the course of discussing a quite different subject, namely, the danger of an outsider bidding if the Company did so, and that on the very next page of that deposition, Cecil corrected any misunderstanding that might have arisen. Assuming the statement at J.A. 50 gives rise to doubt about Cecil's belief, certainly that doubt can hardly be properly resolved on summary judgment.

so that arguments of this kind by Weiss are simply a form of question-begging.[8]

A different problem with Weiss' method of argument is raised by the settled rule, conceded by Weiss, that "summary judgment is prohibited if conflicting 'permissible inferences' may reasonably be drawn from the underlying facts" so that inferences can be relied on by the moving party "only when no conflicting inferences can rationally be drawn" (Weiss Br. 11). Weiss' criticism of appellants' explanations for their acts, however, continually draws inferences in his favor when contrary inferences are not merely permissible but at least equally compelling. This technique, permissible in a plenary trial, subverts the very principle of a summary judgment motion and is squarely contrary to *United States v. Diebold, Inc.*, 369 U.S. 654 (1962).

A striking example of this technique is Weiss' attempt to infer that the directors' willingness to pay Joel's cost of acquisition of the stock (including allocable litigation expenses), up to the book value of the stock but not above, demonstrates that they were acting in bad faith and indifferent to the Company's interests. Yet, plainly the price formula is equally consistent with the view that Cecil and Hirshman honestly believed that the stock would be an advantageous acquisition to the Company if purchased for no more than book value and that they believed Joel's allocable litigation expenses could properly be regarded as a cost of his acquisition (since he could not have secured the stock at all without that litigation). In short, this price formula described by Weiss as the "first proof of bad motive" allows nothing more than a choice between con-

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[8] In fact, in his discussion of *each* of the three points relied upon to show bad faith, Weiss directly relies on the assumption that the price paid by the Company exceeded the value of the stock to it. See Weiss Br. 36, 38, 40. See also id. 41.

flicting inferences and is no argument whatever for summary judgment (Weiss Br. 36).[9]

Finally, Weiss' collection of "facts" from which he seeks to draw an irrefutable inference of bad faith simply omits or summarily disregards key facts on which Cecil and Hirshman rely in support of a contrary inference. Thus, Weiss makes no mention of the fact that both Cecil and Hirshman had stock interests in the Company, very substantial in Cecil's case (Cecil Br. 20), so that they both had every interest in preventing a transaction disadvantageous to the Company and admittedly providing them no personal profit whatever.[10] Clearly no fair inference of bad faith is tenable when it relies only on those circumstances favorable to one side.

Quite apart from its particular defects in logic and completeness, Weiss' argument for a summary determination that appellants acted in bad faith conflicts with the expressed unwillingness of courts to allow summary judgments of this kind (see cases cited Cecil Br. 14) and confirms the wisdom of the courts. Demonstrably, Weiss' method requires an unraveling and appraisal of all of the myriad disputed facts and debatable inferences pertinent to an individual's motives in the inadequate confines of written memoranda; and it

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[9]Similarly, Weiss argues that if the directors had actually believed Joel would bid against the Company, surely they would have "remonstrated" with him (Weiss Br. 39). Yet, it is a disputed question whether Joel had a right to bid against the Company (see pp. 5-6, supra) and still more pertinently, the record certainly allows the inference that Cecil and Hirshman believed that Joel could lawfully bid. If so, Weiss can hardly rely upon the lack of a remonstrance to show bad faith without again choosing between conflicting permissible inferences.

[10]Another important circumstance virtually ignored by Weiss is that the other directors of the Company approved the purchase, signifying their own belief that the purchase was beneficial to the Company and the price paid was not excessive. Weiss has shown no reason whatever why these directors had any reason to favor Joel's interest in these transactions.

calls on the court to resolve that ultimate issue—and to label an individual as fraudulent—without ever hearing the oral testimony of the individual himself. It is not surprising that an examination of the only two cases directly cited by Weiss to prove such a procedure is permissible (Weiss Br. 42-43) reveals that in neither case did the court grant summary judgment based on a finding of bad faith.[11]

Finally, the unfairness of the summary judgment on liability is enhanced by the measure of liability summarily employed as to Cecil and Hirshman. The discussion on this issue in their opening brief (pp. 22-25) requires only slight amplification in view of Weiss' response. In sum, the judgment entered by the district judge holds Cecil and Hirshman individually liable for the alleged profits obtained by Joel, even though Weiss concedes that neither of them profited in any way by the transactions at issue (Weiss Mem. 10) and even though the district judge correctly ruled that damage to the Company (if any) could not be determined summarily (Tr. 9-10). The opening brief showed that to hold Cecil and Hirshman liable for profits was both unfair and without precedent (Cecil Br. 22-25).

In his answering brief (p. 44) Weiss initially asserts in substance that the district judge erred in regarding actual damages to the Company—measured by the difference (if any) between the price it paid and the value of the stock to it—as a disputed issue of fact. Weiss contends that the evidence establishes beyond reasonable dispute that "the stock was not worth more than the auction price" (Weiss

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[11] In Washington Post Company v. Keogh, 125 U.S. App. D.C. 32, 365 F.2d 965 (1966), cert. denied, 385 U.S. 1011 (1967), the court granted summary judgment for the defendant on the question whether he had acted maliciously, after the court explicitly noted that the defendant's subjective honesty was conceded and only the issue of recklessness based on objective facts remained open. The other decision, Bond Distributing Co. v. Carling Brewery Co., 32 F.R.D. 409 (D. Md.), aff'd, 325 F.2d 158 (4th Cir. 1963), was an antitrust case decided in the defendant's favor on summary judgment because the plaintiff failed after elaborate discovery to establish any proof of an antitrust violation.

Br. 44), so that the damages to the Company equalled or exceeded Joel's profit. This response has already been answered by the showing that the value of the stock is plainly a disputed issue and that there is virtually no evidence even suggesting that its value was at or below the auction price. See p. 6, *supra*; Cecil Br. 18; Tr. 9-10.

Weiss then argues, alternatively, that Cecil and Hirshman are liable for Joel's alleged profits although they made none themselves (Weiss Br. 44-45). To justify this result, Weiss refers to cases in which fiduciaries who *did profit* wrongfully were held liable for the full amount of profits illegally taken without regard for the precise amount taken by each. It is plain that the refusal of courts in such cases to inquire into exactly how wrongful profits were divided is quite different than a decision that persons who concededly made no profits whatever should be held liable for the profits of another; and it is equally apparent from Weiss' discussion that he has uncovered not a single case in which a court approved the latter result. Accordingly, a remand is required as to Cecil and Hirshman even if their liability is sustained. See Weiss Br. 43 n. 27.

CONCLUSION

The judgment below should be reversed and the case remanded for trial.

Respectfully submitted,

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